Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 2002

CABLE CAR ADVERTISERS, INC., DBA
CABLE CAR CHARTERS,
a California Corporation,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
FREIGHT CHECKERS, CLERICAL EMPLOYEES &
HELPERS LOCAL 856,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO,
Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When in an NLRB backpay proceeding the General Counsel adds allegations that respondent employer has committed new unfair labor practices in the period subsequent to that in which violations have been found, does the General Counsel have the burden of proving those allegations or does the employer have the burden of proving that the adjudicated violations have ceased?

2. If one disregards the Administrative Law Judge's presumption that previously adjudicated violations of the NLRA are deemed to have continued into a subsequent period, does the record contain substantial evidence of violation of the NLRA in the subsequent period, where none of the claimants testified and there was no evidence of specific acts of anti-union discrimination in that subsequent period, during which a new collective bargaining agreement was in place?

3. Where in underlying unfair labor practices proceedings a finding is made that driver Jonathan Palewicz could not drive on weekends in 1993, and that finding is key to the employer's liability to Palewicz, can the ALJ in the subsequent backpay proceeding permit Palewicz to testify that Palewicz could have driven on weekends in 1993 and award damages on that basis?

4. When in an NLRB backpay proceeding the employer is unrepresented by counsel, and General Counsel possesses an internal NLRB memorandum tending to show that a claimant moved out of the relevant market for reasons unrelated to a search for work, can General Counsel withhold the memo and urge recovery for the period after the claimant's departure, or does General Counsel have an obligation to bring the memo to the attention of the Administrative Law Judge?

LIST OF PARTIES

CABLE CAR ADVERTISERS, INC., DBA
CABLE CAR CHARTERS, a California Corporation.

THE NATIONAL LABOR RELATIONS BOARD

FREIGHT CHECKERS, CLERICAL EMPLOYEES &
HELPERS LOCAL 856, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO.

Cable Car Advertisers, Inc., dba Cable Car Charters, has no parent corporation and none of its stock is held by a publicly held company.

Former employees of Cable Car who received awards in the backpay proceeding in this case are:

Kent Bishop
Michael Buckey
Susan Chan
Porfirio Coyoy
Kohlee Gleffe
Douglas Horning
Carl Hovdey
Sheila Lambert
Mavillia Lilenthal
Victoria Mazareigos
Fred McKenzie
Diana Miles
John Modica
Randy Morrison
John Mozol
Rudy Galindo Ortiz
John Palewicz
Glolamreza Radpay
Luis Recinos, Jr.
Andrea Terhune
Rober Telles
William Trulock
Mauricio Velasco
Michele Zimmerman

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CITATIONS OF REPORTS IN THE CASE

The unpublished orders of the Ninth Circuit on Cable Car's petition for review and the NLRB's cross-petition are in the appendix hereto at pp. A-1 to A-4.

The National Labor Relations Board's Supplemental Decision and Order of October 29, 2001, to which is attached the March 7, 2001 Supplemental Decision of Administrative Law Judge Jay R. Pollack, is reported at 336 NLRB No. 85; 2001 NLRB LEXIS 894; and 2001-2 NLRB Dec. (CCH) P16, 181. These Decisions appear in the appendix hereto (A-5–38). The underlying unfair labor practice proceeding is reported at 322 NLRB No. 92 (being p. 554); 1996 NLRB LEXIS 768; 1997-8 NLRB Dec. (CCH) P16195, *Cable Car Advertisers, Inc., dba Cable Car Charters and Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO and Sheila Lambert.*

JURISDICTION

The Court of Appeals dismissed Cable Car's petition for review and granted the NLRB's cross-petition for summary enforcement on December 18, 2002. That court denied Cable Car's timely petition for rehearing on February 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

National Labor Relations Act, as amended (29 U.S.C. 151 et seq.)

Section 7 (29 U.S.C. § 157)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and

to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) (29 U.S.C. § 158(a)(1))

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

Section 8(a)(3) (29 U.S.C. § 158(a)(3))

–(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

Section 10(a) (29 U.S.C. § 160(a))

(a) Powers of the Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. . . .

Section 10(c) (29 U.S.C. 160(c))

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board

upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

Section 10(e) (29 U.S.C. 160(e))

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or

neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Section. 10(f) (29 U.S.C. 160(f))

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. . . .

STATEMENT OF THE CASE

1. The Parties

Petitioner is Cable Car Advertisers, Inc., a California corporation (hereinafter "Cable Car"). Cable Car is wholly owned by Arnold S. Gridley, who is also the president of Cable Car. Respondent is the National Labor Relations Board (hereinafter "NLRB"). Freight Checkers, Clerical Employees and Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO (hereinafter "Local 856") filed a motion to intervene in the Ninth Circuit Court of Appeals in support of the NLRB's petition for enforcement of the Board's order fixing backpay in the case. That motion was granted on November 16, 2001. Local 856 was the charging party before the NLRB in 336 NLRB No. 85, which is this backpay proceeding, and was also one of the charging parties in 322 NLRB No. 92 (p. 554), the underlying unfair labor practice proceeding. On June 17, 1993 Local 856 won a Board election at Cable Car (322 NLRB at p. 558), and at that time the NLRB regional director certified Local 856 as the representative of Cable Car's drivers, ticket sellers, dispatchers, mechanics, and maintenance employees (322 NLRB at p. 558). On December 16, 1993 Cable Car and Local 856 entered into a collective bargaining agreement (322 NLRB at p. 581), pertinent portions of which are included in the appendices of this petition (A-39–51).

2. Facts Relevant to the Issues Presented for Review.

A. Facts Pertaining to the New NLRA Violations Found in the Backpay Proceeding.

Cable Car owns a fleet of some 60 motorized cable cars. Many of them were formerly in use as cable cars by the San Francisco Municipal Railway and have been purchased and converted to motorized use by Cable Car.

The cars were used in the three main divisions of Cable Car's activities, promotions, tours, and shuttles. The terms "promotion" and "charter" are synonymous in Cable Car's activities. A promotion or charter is a letting of the use of a cable car to a customer at an hourly rate. Cable Car always provides the driver. Promotions might be weddings, a caroling tour, trips to and from a football game, shuttling patrons from parking areas to a rock concert and back, and numerous other examples. Tours were scheduled narrated tours of San Francisco and Sausalito. For many years Cable Car operated a scheduled shuttle between Union Square and Fisherman's Wharf. See 322 NLRB at pp. 557-558.

In its activities Cable Car employed drivers, ticket sellers for the shuttle and the tours, a dispatcher, mechanics who worked on the cars, and maintenance employees. In 1993 Cable Car has some 50 employees. 322 NLRB at p. 557.

The company, which was started by Mr. Gridley in the 1960's, had never been unionized. In 1993 Local 856 organized the employees at Cable Car and won a Board election. Resisting unionization, Cable Car was guilty of numerous unfair labor practices in that year. All of them occurred in 1993 (322 NLRB at p. 556, fn 1). Local 856 and an employee, Sheila Lambert, filed unfair labor practice charges against Cable Car in 1993 (322 NLRB, at pp. 556-557).

At the end of 1993 Cable Car and Local 856 negotiated and entered into a collective bargaining agreement, portions of which are reprinted in this petition (A-39–51). Nevertheless, the Board prosecuted the theretofore filed unfair labor practice charges against Cable Car. After trial Administrative Law Judge William L. Schmidt made findings and conclusions against Cable Car on March 29, 1996. All such findings relate only to the year 1993 (322 NLRB

at p. 556 fn 1). The Board affirmed on November 21, 1996, directing Cable Car to make whole 25 employees. The Ninth Circuit granted enforcement of the Board's November 21, 1996 order on February 20, 1998 in an unpublished memorandum. See A-7–8.

The victims of Cable Car's unfair labor practices may be divided into two groups: those whose employment at Cable Car was terminated in 1993 and those who were not terminated but whose hours of work were reduced in 1993 in violation of the NLRA (322 NLRB pp. 569-573). This is an important distinction. For terminated employees backpay is tolled when they receive a bonafide offer of reinstatement. For reduced-hours claimants, backpay is tolled when the discrimination ceases. See A-22 hereto.

The parties were unable to arrive at a voluntary satisfaction of the Board's order, and on April 4, 2000 trial of the backpay phase of the case commenced before Administrative Law Judge Jay R. Pollack. As a result of a fee dispute with its attorneys, Cable Car was not represented by counsel in the backpay trial before Judge Pollack. At trial Cable Car communicated with the court through Kate Brooks Paul, who was a special consultant of Cable Car and who also possessed a juris doctor degree, and through Mr. Gridley's son, Philip Wright.

At the outset of proceedings before Administrative Law Judge Pollack, Ms. Paul on behalf of Cable Car stated that with respect to those claimants who had not been terminated but whose hours of work were unlawfully reduced in 1993, there should be no award of damages in the subsequent years, 1994 through 1998, because Cable Car had not violated the NLRA in those years and had in those years lived up to its collective bargaining agreement with Local 856 (R.T 60). In general, that agreement, entered into in December of 1993, required

that available work be offered to Cable Car's employees on the basis of seniority (A-43–44).

General Counsel contended that in 1994 through 1998, both inclusive, Cable Car continued to discriminate against the reduced hours (i.e. non-terminated) claimants in violation of the NLRA, and that this discrimination consisted in Cable Car's alleged failure to adhere to the contract's rule of seniority in work assignments (R.T. 72-73).

Judge Pollack ultimately found in favor of the charging parties in this case and awarded post-1993 damages to reduced-hours claimants Bishop, Gleffe, Horning, Lambert, McKenzie, Miles, Telles and Trulock. The total of the post-1993 awards to these claimants is $51, 654.25. In other words, Judge Pollack found new, previously unadjudicated NLRA violations by Cable Car occurring in the years 1994 through 1998. In making this finding Judge Pollack held that it was not general counsel or the charging parties who had the burden of proving the new, post-1993 NLRA violations, but that there was in effect a presumption that Cable Car's 1993 illegal discriminations had continued into the years following 1993 and that Cable Car had the burden of proving that such violations had ceased. Specifically on that subject Administrative Law Judge Pollack held as follows:

> "Respondent contends that the discrimination in assignments ended with the new collective bargaining agreement in December 1993. The Regional Director contends that the discrimination continued after the agreement went into effect and that the backpay period did not terminate until May 1999, when Respondent made offers of reinstatement to the terminated employees and assured the remaining discriminatees that Respondent would follow the collective bargaining agreement.

"I view this as a burden of proof issue. It is a well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter. *NLRB v. Piqua Munising Wood Products Co., 109 F.2d 552 (6th Cir. 1940); Shamrock Dairy, Inc., 124 NLRB 494 (1959); International Garment workers' Union, (Saturn & Sedran, Inc.). 136 NLRB 524, 537 (1962).* Thus, Respondent has the burden of establishing that the discrimination ceased.

"First, the evidence shows that employees junior to the discriminatees continued to work more hours than the discriminatees. Further, the credible testimony of Jonathan Palewicz and Michael Buckey shows that barn supervisor Hoa Van continued to discriminate against them in the assignment of hours. Palewicz testified that Hoa Van refused to answer his telephone calls when he attempted to bid for work. She also closed the door when he appeared in person during his designated time slot for bidding. The employees were given a 15-minute time period each week, according to seniority, to bid for work assignments. Buckey testified that he discovered that Hoa Van was offering work to less senior employees rather than permitting Buckey to bid on available assignments. Buckey testified that after he was continually bypassed in 1994 and 1995 he quit his employment with Respondent. Hoa Van, no longer employed by Respondent, did not testify. All Respondent offered were general denials that Respondent never discriminated in its assignment of work to any of its employees. I found such testimony unpersuasive. *I, therefore, conclude that Respondent has not met its burden of*

> *rebutting the presumption that the discrimination continued after December of 1993. I find that the backpay period for the unlawful reduction in hours continued until May 1999."* A-22–23, reported at 336 NLRB No. 85, 2001 NLRB LEXIS 894; 2001-2 NLRB Dec. (CCH) P. 16195. (Emphasis Added)

None of the reduced-hours claimants, who were awarded damages for the post-1993 period, testified in the backpay proceedings. Thus, there was no evidence in these backpay proceedings from Bishop, Gleffe, Horning, Lambert, McKenzie, Miles, Telles, or Trulock. In the underlying unfair labor practice proceedings before Judge Schmidt, which pertained to the tumultuous year of 1993, each of these claimants had testified in detail regarding discriminations practiced upon them in that year, naming jobs, dates, places, and persons (322 NLRB at pp. 569-571). There was no such specific evidence of discrimination against any of the claimants in the backpay proceeding. One of these reduced-hours claimants, Diana Miles was Local 856's shop steward at Cable Car (R.T. 436), yet the testimony of Local 856's bargaining representative, Julie Wall, was that no grievance alleging anti-union discrimination was filed under the collective bargaining agreement in 1994 through 1998 (R.T. 268-269). The agreement prohibited anti-union discrimination and provided a grievance and arbitration procedure for the redress of such discrimination should it occur, See appendix hereto, A-45–50. The post-1993 backpay awards to Miles and the other reduced-hours claimants, which awards are scattered over the 60 months period of 1994 through 1998, assume a steady practice of discrimination throughout that period.

Enforcement agent Karen Thompson provided the evidence of post-1993 discrimination. She used only three sources to do this, the collective bargaining agreement,

seniority lists which Local 856 and Cable Car had prepared, and a business record of Cable Car known as Payroll Check History Reports (R.T. 78-80; 108).When in any quarter the Payroll Check History Reports showed that a less senior employee to Miles, for example, had worked more hours than Miles, Agent Thompson proceeded to a quantification of damages for that quarter (R.T. 108-110). But for each of the reduced-hours claimants the evidence showed innocent reasons which would explain why a less senior employee might work more hours in a particular quarter than did the reduced-hours claimant. Diana Miles, for example, often turned down work. She refused to drive bar hops (R.T. 309-310; 314), an important segment of Cable Car's business. The highest award for the post-1993 period among these eight reduced-hours claimants went to William Trulock ($21,092.43). Chronic illness often kept Trulock away from work (R.T. 514; 518-519). The more Trulock was unable to work, the greater was his damage award in the post-1993 period under the Region's methodology. That methodology assumed that whenever in any quarter a less senior employee worked more hours than a reduced-hours claimant, this was due to new violations of Section 8(a)(3) by Cable Car (R.T. 108-110).

The Payroll Check History Reports also show that quite frequently one or more of the eight reduced-hours claimants would work more hours in a particular quarter than did a more senior non-claimant (Respondent's Ex 13.) Agent Thompson simply did not address this fact.

Cable Car's owner, Arnold S. Gridley, and two persons associated with Cable Car, Kate Brooks Paul and Deborah Daniels Durden, testified that in the post-1993 period, during which time the collective bargaining agreement was in effect, Cable Car's barn manager, Hoa Van, who assigned work during most of that period, offered

work strictly on the basis of seniority (R.T. 327; 368; 493; 587; 590; 626-628; 946-948). For three months during that period Kate Brooks Paul was in charge of assigning work to drivers. She testified that she adhered strictly to the seniority provisions of the contract in doing so (R.T. 587;590).

Two of the representatives for the charging parties at the backpay proceeding were Jon Palewicz and Michael Buckey. Palewicz is a member of the California Bar. Both became employed at Cable Car prior to organization of Cable Car, Palewicz as a driver and Buckey as a ticket seller. They testified that in the post-1993 period Cable Car discriminated against them (R.T. 1131-1133; 1243-1247). *They offered no testimony that Cable Car discriminated against any of the reduced-hours claimants in the post-1993 period.* Palewicz was a terminated claimant (322 NLRB at p. 580) and Buckey received damages only for 1993 (9th Cir. Excerpts of Record, pp. 56 and 86). Neither of them, therefore, is in the same position as the eight reduced-hours claimants who received post-1993 awards.

B. Facts Pertaining to Jonathan Palewicz's Recovery of Damages.

In the underlying backpay proceeding ALJ Schmidt found as a fact that Johathan Palewicz could not drive for Cable Car in 1993 on Fridays, Saturdays, and Sundays, due to Palewicz's employment elsewhere (322 NLRB at p. 570). This finding was based on Palewicz's testimony before Judge Schmidt (ibid).

The finding is key to Judge Schmidt's determination that Cable Car constructively terminated Palewicz in 1993 when, after the Board election, Cable Car's barn manager at the time, Christine Bennett, Mr. Gridley's daughter, scheduled Palewicz for Fridays, Saturdays and Sundays (322 NLRB at pp. 570 and 580).

But in the backpay proceeding, when it was time to fix Palewicz's damages by estimating the hours that Palewicz would have driven, but for the violation, Palewicz reversed his field and testified that he was available to drive on Fridays, Saturdays, and Sundays in 1993 after all (R.T. 1137:

> "Q So, is what you're saying that the testimony in the underlying hearing about your days on Wednesday and Thursdays, those were just your regular schedule, but it didn't limit you as to the other days that you were available, it didn't mean that you were unavailable the other five days of the week?
>
> A That's exactly right.").

AJL Pollack accepted this revised testimony (appendices hereto, A-32–33) and awarded Palewicz damages upon the assumption that Palewicz could drive on Fridays, Saturdays, and Sundays in 1993, disregarding the estoppel created by AJL Schmidt's finding to the contrary.

C. Facts Pertaining to John Mozol's Move to Wisconsin.

In 1993 Cable Car unlawfully terminated John Mozol, the courts have found. In April of 1999 he received a bonafide offer of reinstatement from Cable Car. But before that, in January of 1998, Cable Car discontinued tours, upon which Mozol's work as a dispatcher depended. Judge Pollack found that Mozol should recover backpay from the time of his discharge until the latter date, January, 1998 (A-36–37), but also made allowances for a time when Mozol was unable to work due to a work-related injury. According to Agent Karen Thompson's notes of a telephone conversation with Mozol, Mozol moved to Wisconsin in the beginning of 1994. The same

notes indicate that he told Agent Thompson that he would not have come back to work in California after mid-1995. The memo is appended to Cable Car's April 1, 2002 opening brief in the Ninth Circuit.

This piece of paper the Region turned over to Cable Car's counsel in the early stages of the backpay proceeding, and that counsel delivered the memo to Cable Car when that counsel withdrew from representation of Cable Car due to a fee dispute (*Thelen Reid & Priest v. Cable Car Charters*, S.F. Superior Court No. 314088). The memo was a needle in a haystack and was turned over to Cable Car in one of seven or eight bankers boxes delivered at the same time. Undersigned counsel discovered it in the course of the proceedings in the Ninth Circuit.

At the backpay trial General Counsel did not make mention of the memo. There are several places in the record, dealing with Mozol, where it would have been quite appropriate to do so.

REASONS FOR GRANTING THE WRIT

1. The decision in this case conflicts with the decision of the Fifth Circuit in *NLRB v. International Union of Operating Engineers Local 925, AFL-CIO et al. 460 F 2d 589 (5th Cir. 1972)* on the procedure governing proof of new violations in backpay proceedings and is at odds with fundamental concepts of burden of proof in Anglo-American law.

A labor case in which this Court granted certiorari due to a conflict among the courts of appeals is *Fibreboard Paper Products v. NLRB, 379 U. S. 203 (1964).*

The case of *NLRB v. International Union of Operating Eng. Local 925 460 F.2d 589, 594-602 (5th Cir. 1972)* is directly in point. There the court held that the NLRB may

add new, previously unadjudicated periods to a back pay proceeding, but that: 1) the NLRB has the burden of proving violations in those periods; 2) such burden cannot be met by any presumption that previously adjudicated violations continued into the new period; and 3) such proof must include specific evidence of new discriminations. The court in that case stated, at p. 600:

> "It is axiomatic, of course, that a finding of 'continuous discrimination' during a specified period of time will not support backpay liability for events occurring during a later time span. But the Board order did not, as respondents suggest, impose any such backpay liability. The order provided that 'the General Counsel must necessarily prove that any claimed losses of wages during the expanded backpay period resulted from discriminatory refusals to refer Ross.' The examiner based his backpay award on specific instances of discrimination which he found to have occurred, not upon any finding of continuous discrimination made during an earlier hearing."

In our case none of these requirements was followed. Judge Pollack held that Cable Car had the burden of proving that discrimination ceased (Appendix attached hereto, p. A-23: "Thus respondent has the burden of establishing that the discrimination ceased."). Smudging a proof of damages rule across the line into the area of proof of liability, the Ninth Circuit panel made the same holding: "Cable Car Advertisers, Inc. did not carry its burden of proving that the award to any of the plaintiffs should have been reduced. *Rests. Inc. v. NLRB, 621 F.2d 336, 337-338 (9th Cir. 1980), NLRB v. Carpenters Union, 433 F.2d 934, 935 (1970).*" (See attached Memorandum Decision, p. A-2.) Judge Pollack gave full weight to a presumption that violations once proved continue to occur (Appendix p. A-23), citing inapposite cases. There is

in this record no evidence at all of specific acts of discrimination against the reduced hours claimants in the post-1993 period, no testimony of loss of specific jobs or work, unlike the unfair labor practice proceedings before Judge Schmidt, where such evidence abounded (322 NLRB at pp. 569-573).

2. If one disregards the ALJ's erroneous presumption, the record is without substantial evidence of post-1993 violations by Cable Car, notwithstanding that certain claimants received awards in respect of such alleged violations.

Neither claimant Bishop, Gleffe, Horning, Lambert, McKenzie, Miles, Telles nor Trulock testified in the backpay proceeding. Nevertheless they each received a substantial award for alleged discrimination practiced upon them in the post-1993 period, totaling $51,654.25. There is no specific or particular evidence of discrimination in that period against these claimants. Had there been such discriminations in the post-1993 period, grievances would surely have been filed under the collective bargaining agreement, but none was (R.T. 268-269). The testimony of the Cable Car representatives —that Cable Car adhered to the rule of seniority in assigning work in the post-1993 period (R.T. 327; 368; 493; 587; 590; 626-628; 946-948)—was not shaken on cross examination and remains uncontradicted in the record, save the testimony of Palewicz and Buckey (R.T. 1131-1133; 1243-1247), which did not address the charges of discrimination against other employees. The fact of discrimination cannot reasonably be inferred from hours worked, where numerous innocent reasons might account for the fact that in some quarters after 1993 some of the eight reduced-hours claimants (Bishop, Gleffe, Horning, Lambert, McKenzie, Miles, Telles, and Trulock) sometimes worked fewer hours than less senior employees, and

where it often happened that those eight worked more hours than more senior employees. Standing alone the Payroll Check History Reports cannot prove discrimination, but it was on them that General Counsel put its principal reliance for proof of post-1993 violations of the NLRA.

3. Where it is established in the underlying proceeding that claimant-employee Palewicz could not drive for Cable Car on Fridays, Saturdays, and Sundays in 1993, and Cable Car's liability to Palewicz is premised on that fact, that fact should be deemed established in the backpay proceeding when it comes time to fix Palewicz's damages.

Judge Pollack at least twice stated in the record that he was not going to change any of the findings of Judge Schmidt (R.T. 953; 1014-1015). But in allowing Palewicz to recover damages based on the assumption that Palewicz could work on Fridays, Saturdays, and Sundays in 1993, Judge Pollack did change a finding of Judge Schmidt (". . . days which Palewicz could not drive." 322 NLRB at p. 570). The doctrine of collateral estoppel prohibits this, *Flora and Argus Construction Company* 145 NLRB 583, 584-585, and Palewicz's award should therefore be retried.

Instead of calculating Palewicz's damages on the assumption that Palewicz could not drive for Cable Car on Fridays, Saturdays, and Sundays of 1993, Judge Pollack reexamined the evidence on the subject, including Palewicz's change of testimony on this issue (R.T. 1137, quoted above.) See A-32–33. ("However, he testified that he often drove promotional jobs for Respondent on days that he also worked his regular job. Respondent's records support Palewicz's testimony.") (A-32–33.) It was not proper for Judge Pollack to delve into this matter as if the slate were clean; nor was it proper to permit Palewicz at

the backpay hearing to gainsay his prior protestations before Judge Schmidt (Tr. of Schmidt Hearing, May 29, 1994, p. 307) that he could not drive for Cable Car on Fridays, Saturdays and Sundays, so that Cable Car's scheduling him on these days was a constructive termination.

These points were emphatically made to the Board on the exceptions to the backpay awards (Respondent's Brief in Support of Exceptions to Backpay Awards, April 26, 2001, p. 11 line 17 - p. 12 line 2; Respondent's Reply Brief in Support of Exceptions to Backpay Awards, May 24, 2001, p. 9 lines 5-16). The Board saw this as a credibility issue (A-5).

Because ALJ Pollack decided Palewicz's backpay damages on the basis of the wrong set of factual assumptions, Palewicz's backpay damages should be retired.

4. At the trial of John Mozol's backpay damages the Region possessed evidence—a memo of a telephone conversation with Mozol - which could have resulted in the tolling of Mozol's backpay damages in mid-1995, but did not disclose that memo or the substance of its contents to the Administrative Law Judge, who awarded Mozol damages past mid-1995.

The General Counsel should have brought the 3/29/99 memo to the attention of ALJ Pollack in this case. That memo, apparently notes of Compliance Officer Karen Thompson with John Mozol, indicates that Mozol voluntarily moved to Wisconsin at the beginning of 1994 and would not have returned to work in San Francisco after mid-1995. Over $10,000 of Mozol's $15,718.45 award is for the period after mid-1995. (Excerpts p. 67; 86). The record shows that all his interim earnings were in Wisconsin in this period. (Excerpts, p. 67).

The *Lising* case, *Lising v. I.N.S. 124 F.2d 996 (9th Cir. 1997)* is directly in point. Although not a formal record, the 3/24/99 memo regarding John Mozol is a record of the NLRB. ALJ Pollock never had a chance to consider it, but Compliance Officer Karen Thompson certainly did. The long cross-examination by General Counsel at trial regarding Mozol assumes throughout that Mozol was available to work at Cable Car at all times between 1995 and 1998 (R.T. 1027-1048). Ms. Thompson apparently gave the memo to Cable Car's prior counsel, Thelen. But when Thelen quit Cable Car, which appeared before Judge Pollack in pro per, Ms. Thompson at some point in the proceedings, perhaps when the evidence was focusing on Mozol, should have shared the document with the Administrative Law Judge. It was for the Judge to decide in a contested proceeding whether Mozol would have returned to the Bay Area in those years, and not for the Region unilaterally to make that decision by failing to disclose to the court important evidence bearing on Mozol's right to damages. *Lising v. INS 124 F.3rd 996 (9th Cir. 1997).*

CONCLUSION

Cable Car's petition for certiorari should be granted.

The post-1993 backpay awards of Bishop ($1,422.52), Gleffe ($2,528.88), Horning ($3,869.07), Lambert ($950), McKenzie ($1,272.93.93), Miles ($15,459.86), Telles ($5,058.56), and Trulock ($21,092.43) are not supported by substantial evidence of violations of the NLRA by Cable Car against those claimants in that period of time. Only the erroneous presumption that Cable Car's prior adjudicated violations continued into that period supports those awards. Use of that presumption conflicts with the correct holding of the Fifth Circuit in *NLRB v. International Union of Operating Engineers, Local 925 460 F2d 2d 589, 594-602.* The error in this case appears in the NLRB reports of this case and should be removed.

For the reasons stated above, the backpay claims of Palewicz and Mozol should be retired.

Respectfully,

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San Francisco, Ca. 94104
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Attorney for Petitioner
Cable Car Advertisers, Inc.

March, 2003

APPENDICIES

APPENDICIES

		Page
1.	December 18, 2002 Order of the Ninth Circuit Court of Appeals Denying Cable Car's Petition for Review and Granting Summary Enforcement of the NLRB's Backpay Order.	A-1
2.	February 21, 2003 Order of the Ninth Circuit Court of Appeals Denying Cable Car's Petition for Rehearing.	A-3
3.	October 29, 2001 Supplemental Decision and Order of the National Labor Relations Board Affirming the Supplemental Decision of Administrative Law Judge Jay R. Pollack; March 7, 2001 Supplemental Decision of Administrative Law Judge Jay R. Pollack.	A-5
4.	Pertinent Portions of the December 13, 1993 Agreement Between Cable Car Charters, Inc., and Professional and Clerical Employees Division of Freight Checkers, Clerical Employees & Helpers Local 856, I.B.T.	A-39

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABLE CAR ADVERTISERS, INC., dba CABLE CAR CHARTERS, a California Corporation

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

FREIGHT CHECKERS, CLERICAL EMPLOYEES & HELPERS LOCAL 856, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Intervenor,

v.

CABLE CAR ADVERTISERS, INC., d/b/a CABLE CAR CHARTERS, a California Corporation Respondent.

No. 01-71733

NLRB Nos. 20-CA-35377
20-CA-25789

MEMORANDUM*

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v.

No. 01-71947

NLRB Nos. 20-CA-25377
20-CA-25789

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

On Petition for Review of an Order of the
National Labor Relations Board

Submitted December 4, 20O2**

San Francisco, California

Before: COWEN, ***HAWKINS and W. FLETCHER, Circuit Judges.

Substantial evidence supports the National Labor Relations Board's determination of the end dates of the backpay periods and its use of the formulas employed to determine the amount of backpay owed to each claimant. *NLRB v. Int'l Ass'n of Bridge, Structural and Reinforced Iron Wrks, Local 378,* 532 F.2d 1241, 1242 (9th Cir. 1976). Cable Car Advertisers, Inc. did not carry its burden of proving that the award to any of the plaintiffs should have been reduced. *M Rests., Inc. v. NLRB,* 621 F.2d 336, 337-38 (9th Cir. 1980); *NLRB V Carpenters Union,* 433 F.2d 934, 935 (1970).

In consequence, Cable Car's petition for review is DISMISSED and the Board's cross-petition for summary enforcement of its backpay order is GRANTED.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Robert E. Cowen, Senior CircuitJudge for the Third Circuit, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABLE CAR ADVERTISERS, INC., dba CABLE CAR CHARTERS, a California Corporation

Petitioner,

FREIGHT CHECKERS, CLERICAL EMPLOYEES & HELPERS LOCAL 856, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v.

CABLE CAR ADVERTISERS, INC., dba CABLE CAR CHARTERS, a California Corporation Respondent.

No. 01-71733

NLRB Nos. 20-CA-35377
20-CA-25789

ORDER

No. 01-71947

NLRB Nos. 20-CA-25377
20-CA-25789

Before: COWEN,* HAWKINS and W. FLETCHER, Circuit Judges.

The petition for rehearing by Petitioner Cable Car Advertisers Inc., filed January 31, 2003, is hereby DENIED.

* The Honorable Robert E. Cowen, Senior Circuit Judge for the Third Circuit, sitting by designation.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Cable Car Advertisers, Inc., d/b/a Cable Car Charters *and* Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO *and* Sheila Lambert.

Cases 20-CA-25377 and 20-CA-25789

October 29, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On March 7, 2001, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

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1 Member Walsh did not participate in the decision on the merits.

2 The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the recordand find no basis for reversing the findings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cable Car Advertisers, Inc., d/b/a Cable Car Charters, San Francisco, California, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and State laws:

Diana Miles	$15,459.86
Kent Bishop	3,422.26
Robert Telles	5,092.31
William Trulock	26,118.71
Luis Recinos, Jr.	2,363.26
Douglas Horning	3,869.07
Carl Hovdey	397.75
Jon Palewicz	12,717.47
Sheila Lambert	2,055.00
Michelle Zimmerman	2,672.62
Fred McKenzie	5,905.73
Kohlee Gleffe	3,167.90
Michael Buckey	8,113.00
Randy Morrison	2,617.44
John Modica	1,903.65
Andrea Terhune	317.36
Susan Chan	249.15
Porfirio Coyoy	14,464.40
Rudy Galindo Ortiz[3]	1,970.63
Victoria Mazariegos	1,455.00
Mavillia Lillienthal	1,663.75

3 Backpay for Rudy Galindo Ortiz shall be disbursed in accordance with the instructions set forth in fn. 10 of the judge's recommended Order.

Mauricio Velasco	1,779.04
Gholamreza Radpay	7,985.25
John Mozol	15,718.45
TOTAL	$141,479.06

Dated, Washington, D.C., October 29, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Paula Katz, Atty., for the General Counsel.

Kate Brooks Paul, Arnold Gridley, and *Phillip A. Wright,* of San Francisco, California, for the Respondent.

William Sokol, Esq. of Oakland, California, and *Jonathan Palewicz, Esq.*, of San Francisco, California, for the Union.

Michael Buckey, of San Francisco, California, for Sheila Lambert.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on various dates beginning April 4, 2000, and ending May 4, 2000. On November 21, 1996, the Board issued its Decision and Order (322 NLRB 554) finding that Respondent, Cable Car Advertisers, d/b/a Cable Car Charters, had violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Board ordered, inter alia, that Respondent make whole certain employees for losses resulting from its unfair labor practices. Thereafter, on

February 20, 1998, the United States Court of Appeals for the Ninth Circuit entered its Judgment[1] enforcing the Board's Order. A controversy having arisen over the amount of backpay due under the terms of the Board's Order, on January 13, 1999, the Regional Director for Region 20 of the Board issued a compliance specification and notice of hearing. The specification was amended at the hearing.

The issues presented for decision are: (1) whether Respondent complied with the Board's Order prior to May 1999; (2) whether Respondent established that General Counsel's backpay formulas are unreasonable or arbitrary; and (3) whether Respondent proved any of its affirmative defenses.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. THE UNDERLYING UNFAIR LABOR PRACTICES CASE

Respondent operates motorized cable cars as shuttles, tours, and charters/promotions in San Francisco, California. At the time of the underlying unfair labor practices, the shuttles ran from Macy's Department Store in Union Square to A. Sabella's Restaurant in the Fisherman's Wharf area. The tours were 1, 2, and 3 hours in San Francisco and Sausalito, California. At that time, the tour operation was conducted from curbside space at Pier 41, about three blocks from A. Sabella's Restaurant.

1 Ninth Circuit Nos. 97-70069, 97-70253, Unpublished Memorandum filedFebruary 20, 1998.

In the spring of 1993, Respondent's employees started organizing with the Union. In June 1993, the Union was certified as the exclusive bargaining representative of a bargaining unit which included Respondent's full-time and part-time tour drivers, promotion and shuttle drivers, ticket sellers, dispatchers, maintenance employees, and mechanics. The Union began a consumer boycott of Respondent on July 2, 1993. The parties agreed to a collective-bargaining agreement in December 1993.

In its November 21, 1996 decision, the Board adopted the findings and conclusions of Administrative Law Judge William L. Schmidt that Respondent unlawfully: (1) reduced Sheila Lambert's hours by discontinuing Lambert's shuttle assignments on May 7, 1993; (2) discharged or laid off employees Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza (Ray) Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, and Maurico Velasco in June and July 1993; (3) constructively discharged Jonathan Palewicz in July 1993; (4) changed the schedule and reduced the work hours of Kent Bishop, Michael Buckey, Luis Recinos, Kohlee Gleffe, Douglas Horning, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, William Segen, Robert Telles, William Trulock, and Michelle Zimmerman beginning on June 15, 1993; and (5) closed its shuttle operations and/or tour operations early, or did not operate them at all, on July 3, 4, 5, 9, 10, and 11, 1993.

As a result, the Board Order requires Respondent to offer reinstatement to and make whole, Chan, Coyoy, Hovdey, Mozol, Mazariegos, Radpay, Ortiz, Reyes (now Lillienthal), Terhune, Velasco, and Palewicz. In addition, the Board ordered Respondent to make whole Bishop, Buckey, Gleffe, Horning, Lambert, Miles, McKenzie,

Modica, Morrison, Recinos, Segen,[2] Telles, Trulock, and Zimmerman for the reduction in their hours. Respondent was also ordered to make whole all employees who were affected by the early closing of its shuttle and tour service between July 3 and 11, 1993. Finally, the Board ordered Respondent to cease and desist from unlawfully reducing its employees' work hours.

II. THE GENERAL COUNSEL'S GROSS BACKPAY FORMULAS

Karen Thompson, board agent, testified that she prepared the compliance specifications. Amendments to the compliance specifications were necessary as Respondent provided additional information at various times before and during the hearing.

In identifying the beginning of each of the discriminatees' backpay period, Thompson used the date of discrimination set forth in the Board's decision. The backpay period for most employees did not terminate until May 29, 1999, when they were offered reinstatement or assured that scheduling would be done in accordance with the contract. Backpay for ticket sellers Buckey, Morrison, Modica, Terhune, and Chan, and for dispatcher John Mozol was tolled on January 7, 1998, when Respondent ceased operating the tour and shuttle business, therefore negating the need for ticket sellers and dispatchers. The General Counsel admits that the backpay period for Gleffe ended on October 25, 1995, and that the backpay period for Lillienthal ended on July 26, 1994.

The collective-bargaining agreement, which went into effect in January 1994, contained seniority provisions and bidding procedures that had not previously existed. Thus, Thompson could not use the same assumptions and gross backpay formulas for calculating the number of hours

2 Segen who did not cooperate in the compliance investigation.

claimants would have worked during the entire backpay period absent the discrimination. Instead Thompson developed four gross backpay formulas (which will be discussed below). In each formula, she calculated gross backpay by multiplying the average hourly wage rate by the number of hours she calculated the claimants would have worked each quarter.

A. Wage Rates

Respondent did not have records showing the claimants wage rates. Thompson used the 1993 payroll records to calculate the average 1993 hourly wage rate for each claimant, dividing the total number of hours each worked into their 1993 gross wages.[3] By using the gross wages, which included various tips and gratuities paid to the drivers and commissions paid to some of the ticket sellers, this formula attempted to make the claimants whole for all moneys they would have earned absent the discrimination. Thompson used the same wage rate during the entire backpay period because wages were not increased under the collective-bargaining agreement.

B. Gross Backpay Formula for Drivers, Ticket Sellers and the Mechanic for 1993

For the drivers, ticket sellers, and the mechanic in 1993, Thompson used a formula based on a proportional share of the hours worked in 1992.[4] Backpay for most employees began in June or July 1993. Thompson testified that she thought the best approximation of the hours that the claimants would have worked in the second half of

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3 Carl Hovdey did not work for Respondent in 1993. Thompson used Hovdey's 1992 wage rate of $11 per hour in calculating Hovdey's gross backpay.

4 Thompson did not use a projection of the early 1993 earnings because Respondent's business is seasonal and the early months of 1993 did not include the busy tourist season.

1993, absent the discrimination, was based on the hours they had worked in 1992. Because Respondent did not have any payroll records or other records showing the employees' 1992 hours on a biweekly or quarterly basis, Thompson used a summary showing the total 1992 hours worked by each employee.

Using the summary of 1992 hours, Thompson then created separate charts for drivers, ticket sellers, and the mechanic. For each classification, she totaled up the number of hours worked by all employees in that classification in 1992. She then divided the number of hours each claimant worked in 1992 into the total number of hours worked by all employees in that classification in 1992. This resulted in an individual proportion of the total hours that each claimant worked in 1992, such as 3 percent, 5 percent, etc. For employees who had not worked all of 1992, Thompson took an average of the number of hours they had worked and projected that number over the entire year. Using the resultant total, Thompson came up with a proportion that each claimant would have worked in 1992, if employed the entire year.

Next, Thompson used Respondent's 1993 payroll records to total the 1993 hours actually worked in each job classification, by all drivers, tickets sellers, and mechanics. Then, again working by classification, she took the proportion of 1992 hours each employee worked and multiplied that percentage by the total number of hours worked by all employees in that classification in 1993. Using this proportional formula, Thompson calculated the total number of hours each claimant would have worked in 1993, absent the discrimination against them. Thompson then deducted the hours that any claimant had worked in 1993 from the total hours he or she would have worked absent the discrimination. This total gave Thompson the number of hours for calculating gross backpay for

each employee in 1993.

C. Gross Backpay Formula for the Maintenance (Barn) Employees in 1993

The Board found that maintenance (barn) supervisors Hoa Van and Ty Van worked a substantial amount of overtime after the five maintenance employees were laid off in July 1993, and that an unidentified couple were observed performing the work of the maintenance employees. Although Thompson requested a breakdown of the hours spent by the Vans doing bargaining unit work, Respondent did not provide such information. Further, Thompson could not obtain the information from Respondent's payroll records. As a result, the payroll records did not reflect the total hours worked by maintenance employees for gross backpay. Thus, Thompson could not use the same formula for the maintenance employees as she had used for the drivers, ticket sellers, and mechanic. For the maintenance employees, Thompson created a backpay formula based on the assumption that the maintenance employees would have worked the same hours in 1993, as they had worked in 1992. After Thompson allocated 1993 hours to each maintenance employee, she deducted the actual number of hours that each had worked. She then divided the difference between the two quarters in the 1993 backpay period. For employee Mauricio Velasco,[5] who had not worked in 1992, Thompson used an average number of the hours he had worked each pay period in 1993 until his unlawful layoff in the third quarter of 1993, and then subtracted the number of hours he worked.[6]

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5 The spelling of Velasco's name appears as corrected at the hearing.

6 Velasco averaged 34 hours per week in the 16 weeks he worked prior to his unlawful layoff in 1993.

D. Gross Backpay Formula for Drivers, Tickets Sellers and Maintenance Employees after January 1994

As stated above, on January 1, 1994, the new collective-bargaining agreement went into effect with new seniority and bidding provisions. Thus, the proportional formula used for 1993 could not be used after the contract changed the way jobs and hours were assigned. Thompson created a formula to approximate what the bidding would have looked like, and the hours the claimants could have worked under the contract, absent continuing discrimination by Respondent. The same formula was utilized for the maintenance employees as well as the drivers and ticket sellers.[7]

The collective-bargaining agreement called for company seniority by job classifications of drivers, ticket sellers/dispatchers, mechanics, and maintenance personnel. It also provided for full-time regular, part-time regular, and on-call/will-call employees. A full-time regular employee is defined as "someone who regularly works 35 hours or more per week." A part-time regular employee is defined as "someone who regularly works less than 35 hours per week." An on-call/will-call employee is defined as someone "without any regularly scheduled shifts each week." The contract also provided a system of scheduling based on a bidding procedure that had not existed before the contract. In each classification, in order of seniority, full-time regular employees bid first and were permitted to bid up to 40 hours per week. Then part-time regular employees, in order of seniority, could bid up to 34 hours per week. The remaining work would be offered to the on-call/will-call employees in order of seniority.

In order to reconstruct how much work the claimants would have received, absent discrimination, Thompson

7 The backpay period for the mechanic, Ray Radpay, ended on December 31, 1993. Thus there is no backpay formula for the mechanic after 1993.

had to reconstruct a seniority list broken down by full-time, part-time, and on-call employees for each classification. She used Respondent's documents to complete this task. Pursuant to the contract, Respondent had issued forms to employees to designate whether they were full-time, part-time, or on-call/will-call employees. Respondent and the Union agreed on a seniority list based on the employee designations. Thompson used this documentation to place the employees in the appropriate categories. One employee, Kent Bishop, switched from full-time to part-time status during his backpay period. Thompson changed Bishop's status as of that time.

Thompson created a master seniority list of all employees who worked for Respondent at any time from July 1993 until May 28, 1999. She divided the seniority list into classifications of drivers, ticket sellers, mechanics, and maintenance employees. She then subdivided each classification by seniority into full-time, part-time, and on call employees.

Thompson first determined the number of hours worked each quarter by each driver, ticket seller, and maintenance employee, and made separate charts for each classification. In each quarter, Thompson then took the most senior claimant and determined if any less senior employees in the same classification worked more hours than the claimant. If it appeared that the scheduling had been done according to seniority for that claimant and no less senior employee had worked more hours, the claimant received no hours and therefore, no backpay. for that quarter. On the other hand, if a less senior employee had worked more hours than the claimant, Thompson created a pool of available hours comprised of all hours worked by employees with less seniority in that classification during that quarter. Thompson also included in that pool all hours worked that quarter by employees in excess of 520

hours, which was the maximum that full-time employees could have gotten by bidding for 40 hours per week as allowed under the contract. Some of the employees, but none of the discriminatees, exceeded 520 hours in numerous quarters. It is the theory of the Regional Director that the excess hours worked by other employees were part of the "on-going discrimination" and, therefore, these hours were included in the available pool of hours for backpay purposes.

In allocating hours to each discriminatee from the pool of available hours, Thompson looked at the hours worked by more senior employees and approximately how seniority would have factored into the bidding process. If the discriminatee was full-time and more senior employees worked the maximum 520 hours, Thompson gave the most senior discriminatee the difference between 520 hours and the hours he or she actually worked. This brought that claimant's total hours up to 520 hours, assuming there were enough hours in the pool. On the other hand, if more senior full time-employees had worked less than 520 hours in that quarter, the claimant was entitled to additional hours up to the total worked by more senior employees. For example if more senior full-time employees worked only 480 hours in a particular quarter, Thompson assumed that the next senior full-time employee would not have worked more than 479 hours. As a result, discriminatees did not end up with more hours than more senior employees had worked. Thompson then repeated this process with the next senior discriminatee, identifying if less senior employees had worked more hours. If so, Thompson used the pool of available hours that she created, but with a difference. She subtracted from the pool of available hours those hours that she had credited to more senior discriminatees, and those hours worked by

non-discriminatees more senior to the claimant at issue. Under this procedure, the pool of available hours for each discriminatee included only those hours worked in that quarter by employees with less seniority than the particular discriminatee, plus hours worked in excess of the contract guidelines, as discussed above.

After allocating hours to full-time discriminatees, Thompson allocated any remaining available hours to part-time employees in each classification by seniority. To do this, she repeated the process discussed above, looking to see if any less senior part-time employees worked more hours than a more senior part-time discriminatee. If that occurred and there were available hours remaining in the pool, Thompson looked to see the number of hours the more senior part-time employee had worked, using the same process she had used with full-time employees. As a result, none of the part-time employees were given more hours each quarter than more senior part-time employees had worked. Thompson continued this process, subtracting used hours from the pool, until no hours were remaining to distribute to the claimants.

When there were more hours worked by nondiscriminatee employees, including new hires throughout the backpay period, there were more hours to allocate down to the various claimants with less seniority. In the winter, when business was slow, there were often insufficient hours to allocate to anyone other than the most senior employees in each classification. As a result, in numerous quarters, there were not enough hours to bring all of the full-time employees, let alone part-time employees, up to 520 or 442 hours in a quarter, respectively. In fact, due to the reduction in Respondent's revenues, there were very few quarters after the collective-bargaining agreement went into effect where there were hours allocated to part-time employee-claimants.

The Regional Director contends that it is reasonable to assume that the discriminatees would have bid on the maximum number of hours allowed under the contract because the payroll records established that there were many quarters in which employees did work those hours and more. In addition, numerous claimants told Thompson that they would have bid up to the maximum number of hours per week if those hours had been offered.

E. Gross Backpay Formula for Dispatcher/Operations Coordinator John Mozol

Thompson testified that because Mozol was the only employee in his classification, she used the actual hours Mozol worked in late 1992 and early 1993, to come up with his average of 40 hours per week. Mozol had worked an average of 40 hours per week even during the slow period in early 1993.

III. APPLICABLE LEGAL PRINCIPALS

The applicable principles of law were set forth by Administrative Law Judge Richard J. Linton in *Minette Mills, Inc.*, 316 NLRB 1009 (1995):

> First, when loss of employment is caused by a violation of the Act, a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989).
>
> Second, respecting the close of the backpay period, an offer of reinstatement "must be unequivocal, specific, and unconditional." *A-1 Schmidlin Plumbing Co.*, 312 NLRB 191 (1993).
>
> Third, in compliance proceedings, the General Counsel bears the burden of proving the amount of gross backpay due. *Florida Tile Co.*, 310 NLRB 609

(1993); *Arlington Hotel*, Id. In discharging the Government's burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a somewhat different result. *NLRB v. Overseas Motors*, 818 F.2d 517 (6th Cir. 1987); *Kansas City Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982). Nevertheless, an Administrative Law Judge need not recommend the General Counsel's gross backpay formula to the Board when a more accurate one is established in the record. *Frank Mascali Construction*, 289 NLRB 1155, 1157 (1988); *J.S. Alberici Construction Co.*, 249 NLRB 751 fn. 3 (1980).

Fourth, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Florida Tile*, supra. Thus, the burden of showing the amount of any interim earnings, or a willful loss of interim earnings, falls to the Respondent (*Minette* here). *Arlington Hotel*, supra. Although it is the Respondent's burden to establish a discriminatee's interim earnings, if any, it is the General Counsel's voluntary policy to assist in gathering information on this topic and to include that data in the compliance specification. *Florida Tile*, supra; *Arlington Hotel*, supra; NLRB Casehandling Manual (Part Three) Compliance sections 10540.1 and 10629.9. As described in a recent case, the voluntary policy is nothing more than an "administrative courtesy." *Ryder System*, 302 NLRB 608, 613 fn. 7 (1991), enfd. 983 F.2d 705 (6th Cir. 1993).

Fifth, even though a discriminatee must attempt to mitigate his or her loss of income, the discriminatee

is held only to a reasonable assertion rather than to the highest standard of diligence, and success is not the test of reasonableness. *Florida Tile*, supra; *Arlington Hotel*, supra. Interim employment means comparable work—substantially equivalent employment. Thus, it is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment.*Arlington Hotel*, supra.

Sixth, when a discriminatee voluntarily quits interim employment, the burden shifts from the Respondent to the Government to show that the decision to quit was reasonable. *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982); NLRB Casehandling Manual (Part Three) section 10545.4. (On a single point, respecting concealment of interim earnings, the Board subsequently overruled *Big Three*, supra. *American Navigation Co.*, 268 NLRB 426, 427 (1983). Other points in *Big Three* were not disturbed.)

Seventh, a discharge from interim employment, without more, does not constitute a willful loss of employment. *Ryder System*, supra at 610.

IV. FINDINGS AND CONCLUSIONS

A. The Backpay Period Ended May 1999

In the instant case, in order to decide whether General Counsel's gross backpay formulas are reasonable, I must determine whether Respondent complied with the Board Order prior to May 1999. As stated above, General Counsel's backpay formulas assume that Respondent's discrimination against the claimants continued after the collective-bargaining agreement went into effect. Respondent, on the other hand, contends that backpay should be tolled once the bargaining agreement went into effect.

In its November 21, 1996 decision, the Board adopted the findings and conclusions of Administrative Law Judge William L. Schmidt that Respondent unlawfully: (1) reduced Sheila Lambert's hours by discontinuing Lambert's shuttle assignments on May 7, 1993; (2) discharged or laid-off employees Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza (Ray) Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, and Maurico Velasco in June and July 1993; (3) constructively discharged Jonathan Palewicz in July 1993; (4) changed the schedule and reduced the work hours of Kent Bishop, Michael Buckey, Luis Recinos, Kohlee Gleffe, Douglas Horning, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, William Segen, Robert Telles, William Trulock, and Michelle Zimmerman beginning on June 15, 1993; and (5) closed its shuttle operations and/or tour operations early, or did not operate them at all, on July 3, 4, 5, 9, 10, and 11, 1993.

As a result, the Board Order requires Respondent to offer reinstatement to and make whole, Chan, Coyoy, Hovdey, Mozol, Mazariegos, Radpay, Ortiz, Reyes (now Lillienthal), Mazariegos, Radpay, Ortiz, Reyes (now Lillienthal), Terhune, Velasco, and Palewicz. In addition,

the Board ordered Respondent to make whole Bishop, Buckey, Gleffe, Horning, Lambert, Miles, McKenzie, Modica, Morrison, Recinos, Segen,[8] Telles, Trulock, and Zimmerman for the reduction in their hours. Respondent was also ordered to make whole all employees who were affected by the early closing of its shuttle and tour service between July 3 and 11, 1993. Finally, the Board ordered Respondent to cease and desist from unlawfully reducing its employees work hours.

Backpay for Chan, Coyoy, Hovdey, Mozol, Mazariegos, Radpay, Ortiz, Lillienthal, Terhune, Velasco, and Palewicz terminates for each employee when he or she received a valid offer of reinstatement. The backpay period for Bishop, Buckey, Gleffe, Horning, Lambert, Miles, McKenzie, Modica, Morrison, Recinos, Telles, Trulock and Zimmerman terminates for each employee when the discrimination concluded against him or her.

Respondent contends that the discrimination in assignments ended with the new collective-bargaining agreement in December 1993. The Regional Director contends that the discrimination continued after the agreement went into effect and that the backpay period did not terminate until May 1999, when Respondent made offers of reinstatement to the terminated employees and assured the remaining discriminatees that Respondent would follow the collective-bargaining agreement.

I view this as a burden of proof issue. It is a well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter. *NLRB v. Piqua Munising*

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8 As stated above, no backpay was sought for Segen who did not cooperate in the compliance investigation

Wood Products Co., 109 F.2d 552 (6th Cir. 1940); *Shamrock Dairy, Inc.*, 124 NLRB 494 (1959); *Garment Workers (Saturn & Sedran, Inc.)*, 136 NLRB 524, 537 (1962). Thus, Respondent has the burden of establishing that the discrimination ceased.

First, the evidence shows that employees junior to the discriminatees continued to work more hours than the discriminatees. Further, the credible testimony of Jonathan Palewicz and Michael Buckey shows that barn supervisor Hoa Van continued to discriminate against them in the assignment of hours. Palewicz testified that Hoa Van refused to answer his telephone calls when he attempted to bid for work. She also closed the door when he appeared in person during his designated time slot for bidding. The employees were given a 15-minute time period each week, according to seniority, to bid for work assignments. Buckey testified that he discovered that Hoa Van was offering work to less senior employees rather than permitting Buckey to bid on available assignments. Buckey testified that after he was continually bypassed in 1994 and 1995 he quit his employment with Respondent. Hoa Van, no longer employed by Respondent, did not testify. All Respondent offered were general denials that Respondent never discriminated in its assignment of work to any of its employees. I found such testimony unpersuasive. I, therefore, conclude that Respondent has not met its burden of rebutting the presumption that the discrimination continued after December of 1993. I find that the backpay period for the unlawful reduction in hours continued until May 1999.

B. The Gross Backpay Formulas are Reasonable

It is well established that the Board is not required to attain mathematical precision in its formula for determining gross backpay. "Any formula which approximates

what discriminatees could have earned if they had not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." *Am-Del-Co, Inc.*, 234 NLRB 1040, 1042 (1978); *Boyer Ford Trucks*, 270 NLRB 1133, 1138 (1984). All that is required is that the formula be reasonably designed to arrive at as close an approximation of the amount of backpay due as possible. *Rikal West, Inc.*, 274 NLRB 1136 (1985); *Mastell Trailer Corp.*, 273 NLRB 1190 (1984); *Master Slack*, 269 NLRB 106, 109 (1984). See also NLRB v. *Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963).

The backpay formula for the maintenance employees for the year 1993 appears reasonable. In the underlying decision, the Board found that Hoa and Ty Van and other nonbargaining unit individuals cleaned the cable cars in 1993 after the maintenance employees were unlawfully laid off. Respondent failed to show in either the underlying case or the instant hearing how many hours were involved. Further, the amounts were not accounted for in Respondent's payroll records. Thus, I find it reasonable to utilize the 1992 hours worked by the claimants for determining backpay. It was Respondent's wrongdoing and Respondent's failure to properly record the maintenance hours worked in 1993, which made a more accurate formula impossible.

In the underlying case, the Board found that the maintenance employees also worked for Respondent's owner for his other business. The employees were paid by Respondent for this work. Respondent's owner admitted that after 1993, he continued the practice of having Respondent's maintenance employees work for his outside businesses. I find that the backpay formula properly includes hours worked by maintenance employees, paid by Respondent, for these outside businesses.

Respondent raised as a defense that the backpay formula was unreasonable because Respondent did not have any full-time employees. Rather, Respondent argued that all its employees were will call/on call employees. Respondent's documents establish that the company did, in fact, have full-time and part-time employees as well as on call employees. The collective-bargaining agreement establishes these three categories. Further, Respondent's records disclose forms in which the employees were permitted to designate themselves in one of these three categories. In addition there are seniority lists for these three categories agreed upon by the Union and Respondent. Finally, the record contains letters sent by Respondent to the Regional Office admitting the existence of the three categories of employees. Accordingly, I find no merit to this defense.

Respondent raised the defense that the backpay formulas failed to take into account the reduction in business caused by the closure of the shuttle in July 1993. Specifically, Respondent asserts that the shuttle was eliminated at that time except for a few unsuccessful pilot programs. Respondent also argues that its tour business was closed from June 4, 1994, until the end of December 1994, when it was revived albeit on a severely reduced basis.

In the underlying case, the Board found that Respondent terminated its shuttle on July 23, 1993. However, the Board also found that Respondent operated a shuttle on an irregular basis in November and December 1993, and then resumed the regular shuttle after the collective-bargaining agreement was signed.

In the instant case, Respondent's business records establish that the shuttle continued to operate until September 1997. In addition, three witnesses testified to seeing the shuttle operate between 1994 and 1997.

Respondent further asserted that its tours did not operate for about 6 months after it lost its lease at Pier 41. However, Arnold Gridley, Respondent's president, admitted that the Company continued the tours on a reduced basis from Fisherman's Wharf. Respondent's records support this testimony.

Most important, I find that the backpay formulas took into account the decrease in Respondent's revenues. It is undisputed that business revenues declined after the shuttle was closed in July 1993, and again in June 1994 when Respondent lost its lease at Pier 41. However, those operations did not cease until January 1998. The backpay formulas took into account the reduction in the shuttle and tour business. The backpay formula takes into account the reduced hours actually worked in 1993 as well as the cyclical nature of the business. The backpay formulas for the periods after the collective-bargaining agreement went into effect are based on the actual hours worked by all bargaining unit employees. Thus, fewer hours were attributed to the discriminatees based on the fact that there were fewer shuttles and tours after July 1993.

Similarly, the backpay formulas took into account the seasonality of the business. Typically, the summer season is among the busiest periods for Respondent's business. During the summer months, Respondent supplemented its work force with seasonal drivers and ticket sellers. A large part of the backpay period in 1993 included the busy season. Starting in 1994, the backpay was based on the

actual hours worked by bargaining unit employees. Thus, I find that the backpay formulas did in fact account for the seasonality of the business.

Respondent raised as a defense an allegation that the drivers could not have worked all of the hours allocated to them in the compliance specification. Respondent claims that many of the hours worked by the drivers represented conflicting multi-car promotions that required multiple drivers. Thus, Respondent argues that if a discriminatee was already driving, he or she could not work these hours as well. In support of this defense, Respondent provided summaries showing the number of single-car and multiple car promotions each month. However, I find Respondent's evidence insufficient to establish that any hours driven by on-call/will-call employees could not have been worked by the part-time or full-time drivers in the bargaining unit. Respondent never established the numbers of hours of single-car and multiple car events were in conflict, what tours and shuttles were in conflict, or when each discriminatee was unable to work the allocated hours because of such conflict. Given the condition of Respondent's records, it is impossible to reconstruct the impact of multi-car promotions on the bidding schedule. In these circumstances, the uncertainties must be resolved against Respondent as the wrongdoer.

C. Deductions from Backpay

Respondent raised the defense that the discriminatees are not entitled to the hours allocated to them because: (1) they were unavailable to work that many hours in the past; (2) they preferred not to work certain types of promotions; (3) they turned down jobs; and (4) customers made requests that certain drivers be sent or not sent.

As indicated above, Respondent's business is seasonal. The summer season is among the busiest periods

for Respondent's business. During the summer months, Respondent supplemented its work force with seasonal drivers and ticket sellers. A large part of the backpay period in 1993 included the busy season. It would not be fair nor reasonable to limit the hours of a discriminatee to those worked during the slower months of 1993. Moreover, Respondent never established that any of the discriminatees would not or could not work the hours allocated to them by the General Counsel's compliance specification.

Respondent presented some evidence that some of the backpay claimants turned down work, were not available for work, or preferred not to work certain promotions, e.g., bar hops. I found such evidence insufficient to change the allocated hours. Respondent presented only isolated incidents that discriminatees turned down work. There was no evidence that backpay should have been tolled. Furthermore, Respondent did not show that the employees could not have worked their full allotment of hours during other days of the week. Under the collective-bargaining agreement, Respondent was obligated to offer available work to employees based on seniority, even if the employee had expressed a preference not to work certain promotions.

Respondent claimed that certain work was not available to the discriminatees based on individual requests of customers. Only 5 percent of Respondent's promotions included such a request. Most important, Respondent failed to establish how these facts affected any of the discriminatees.

As stated above, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Florida Tile*, supra. Thus, the burden of showing the amount of any interim earnings, or a willful loss of interim earnings, falls

to the Respondent. *Arlington Hotel*, supra. Although it is the Respondent's burden to establish a discriminatee's interim earnings, if any, it is the General Counsel's voluntary policy to assist in gathering information on this topic and to include that data in the compliance specification. *Florida Tile*, supra; *Arlington Hotel*, supra; NLRB Casehandling Manual (Part Three) Compliance Sections 10540.1 and 10629.9. As described in a recent case, the voluntary policy is nothing more than an "administrative courtesy." *Ryder System*, 302 NLRB 608, 613 fn. 7 (1991), enfd. 983 F.2d 705 (6th Cir. 1993). Even though a discriminatee must attempt to mitigate his or her loss of income, the discriminatee is held only to a reasonable assertion rather than to the highest standard of diligence, and success is not the test of reasonableness.

Florida Tile, supra; *Arlington Hotel*, supra. Interim employment means comparable work-substantially equivalent employment. Thus, it is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment. *Arlington Hotel*, supra. When a discriminatee voluntarily quits interim employment, the burden shifts from the Respondent to the Government to show that the decision to quit was reasonable. *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982); NLRB Casehandling Manual (Part Three) Section 10545.4. (On a single point, respecting concealment of interim earnings, the Board subsequently overruled *Big Three*, supra. *American Navigation Co.*, 268 NLRB 426, 427 (1983). Other points in *Big Three* were not disturbed.) Seventh, a discharge from interim employment, without more, does not constitute a willful loss of employment. *Ryder System*, supra at 610.

Employees Palewicz, Mazariergos, and Lillienthal, held second jobs while working for Respondent before

and during the unlawful actions. These employees continued to work their second jobs through their backpay periods, but without increased hours. Thus, the income from their second jobs is not treated as interim earnings. See *U.S. Telefactors Corp.*, 300 NLRB 720, 722 (1990).

Respondent claimed that many of the discriminatees failed to report interim earnings. However, Respondent failed to produce evidence to support this argument. Respondent argued that Miles worked 2 days a week in Sacramento, California. However, Miles' Social Security earnings report showed no such income. Respondent offered no evidence to establish that Miles or any other backpay claimant did not report interim earnings.

D. Defenses as to Certain Discriminatees

Respondent claims that driver Diana Miles is not owed any backpay because she had accidents, had another job in Sacramento, California, and turned down certain promotional work. Miles' backpay was tolled on March 1, 1999, the date of her termination. The legality of that termination is the subject of an independent contempt proceeding. In the instant case, I deal with backpay due to Miles only until March 1, 1999.

First, Arnold Gridley, Respondent's president, admitted that Respondent never denied Miles an assignment because of her accidents. Second, Respondent's evidence never established that Miles turned down more than an occasional job over the backpay period of approximately 4 and a half years. Third, Respondent offered no evidence that Miles was unavailable to work because of an alleged job in Sacramento. As stated above, the existence of a job in Sacramento was not established.

The compliance specification seeks backpay for driver Robert Telles only for the second quarter of 1993 and the third quarter of 1995. Respondent argues that it did not

assign Telles to work after December 1994 because his commercial license expired in 1995. I cannot credit this defense. First, Gridley admitted that Respondent did not discover until March 1998 that Telles had not renewed his commercial license. Respondent's assignment of work to Telles in 1995 could not have been influenced by knowledge that it obtained in 1998.

Second, to drive a motorized cable car for Respondent a driver needed both a Class B driver's license, which was good for 4 years, and a medical certificate, which was good for 2 years. Telles' driver's license and medical certificate indicate that he had both in 1995 and was qualified to drive cable cars that year. Furthermore, if Respondent had not unlawfully reduced Telles' hours, he would have been notified when his renewal was up, and Respondent would have paid for his required medical examination. Respondent's usual practice was to notify drivers that it was time for another medical examination. Respondent failed to explain the failure to notify Telles of his medical examination.

Respondent contends that it does not owe backpay to driver William Trulock. Trulock's backpay was tolled on September 18, 1998, the date of his termination, which is the subject of an independent contempt proceeding. This case only deals with backpay due prior to that date. Respondent contends that it does not owe backpay to Trulock due to driving accidents and customer complaints, Trulock's medical condition, and his unavailability due to vacation travel.

General Counsel admitted that Trulock was unavailable to work due to illness during the first half of 1994, a period for which no backpay is claimed. Gridley testified that on 15 occasions during Trulock's 9 years of employment, Trulock missed all or part of an assigned shift due to medical related reasons. Respondent did not establish

how many hours were involved in such incidents nor did Respondent establish when these incidents occurred. Further, Respondent failed to establish how many hours of work Trulock missed after the second quarter of 1994. Respondent's records reveal that its medical examiner qualified Trulock to drive each year during the backpay period.

Gridley testified that Trulock was not assigned work because of accidents and customer complaints. Respondent, however, failed to provide evidence to support this defense. While Gridley testified that Trulock was denied certain difficult assignments, Trulock was assigned other easier assignments. Accordingly, I find that Respondent has not met its burden of showing that Trulock's backpay should be reduced.

General Counsel deducted from backpay those periods when Trulock was on vacation. For the period between August 24, and September 19, 1996, Trulock was scheduled to be on vacation. However, the records show that Trulock cancelled that vacation and worked during that time period. Again, I find Respondent has failed to establish that Trulock's backpay should be reduced.

Driver Jonathan Palewicz testified in the underlying unfair labor practice case that he was regularly scheduled to work for Respondent on Wednesdays and Thursdays driving the shuttle, and that those were the only days that he would commit to in advance. Even though, Palewicz had another full time job, he worked a large number of hours for Respondent in addition to his Wednesday and Thursday driving. At the instant hearing, Palewicz testified that he could only commit himself to driving on Wednesdays and Thursdays because those were his regular days off from his full-time job. However, he testified that he often drove promotional jobs for Respondent on days that he also worked his regular job. Respondent's

records support Palewicz's testimony. In 1992, Palewicz often worked 5 or 6 days a week for Respondent in addition to his full time job. In 1992, he averaged 34 hours a week for Respondent. While he worked less in the slow season, in the busy season of 1992, Palewicz worked 40 to 60 hours a week for Respondent in addition to his full-time job. Thus, I find that Respondent has failed to establish that Palewicz would have worked no more than 2 days per week or that Palewicz could not have worked the hours allocated to him by the backpay formula.

Respondent contends that it terminated driver Sheila Lambert in 1995. However, Gridley admitted that Respondent permitted Lambert to continue to drive after her alleged termination. Based on the documentary evidence I find that Lambert continued in Respondent's employ until 1999. Under the accepted gross backpay formula, Lambert is entitled to backpay until the fourth quarter of 1998. There would not have been sufficient hours in 1999, for Lambert to be allocated work hours in order to receive gross backpay.

Respondent claims that it does not owe backpay to ticket seller Fred McKenzie because he was not available to work due to illness. Backpay for McKenzie was tolled on January 9, 1994, when he went out on disability and ceased working for Respondent. Respondent failed to meet its burden of establishing when McKenzie was unavailable for work prior to January 1994.

Respondent claims that it does not owe backpay to ticket seller Kohlee Gleffe because Gleffe was a student. Gridley testified that Gleffe was a student the whole time that she worked for Respondent. Gleffe worked 40 hours per week for Respondent during the summer and part-time 5 days a week during the school year. As Gleffe was a full-time student before the discrimination, her full-time

attendance at school did not affect her availability for work. See *J.L. Holtzendorff Detective Agency*, 206 NLRB 483, 484-485, (1973).

General Counsel was unable to locate maintenance employee Rudy Galindo-Ortiz. Backpay was tolled for Ortiz on January 1, 1998, the date of his reinstatement. General Counsel estimated Ortiz's interim earnings at 75 percent of his gross backpay. Backpay should be paid to the Regional Director to be held in escrow for a period not to exceed one year from either Respondent's compliance or to the date the Board's Supplemental Decision and Order becomes final, including enforcement, whichever is later. See *Starlite Cutting, Inc.*, 284 NLRB 620 (1987). If Ortiz is not located within that time period, his backpay shall be returned to Respondent. If Ortiz is located within that time period, interim earnings and other deductions to gross backpay can be resolved informally or through a supplemental compliance proceeding, if necessary, and the excess, if any, returned to Respondent.

General Counsel admits that mechanic Gholamreza (Ray) Radpay was tolled on December 31, 1993. Radpay's job would have ceased to exist because work would not have been available to him under the bidding provisions of the collective-bargaining agreement. Respondent argues that Ray Radpay is not entitled to any backpay.

Respondent argues that Radpay was hired in 1992 because more senior mechanics were on vacation. Two mechanics were allegedly on extended vacations in 1992. However, Respondent failed to establish when and how long the more senior mechanics were on vacation. In the first part of 1993, Radpay worked more hours than at least one of the more senior mechanics. Under these circumstances, I find it reasonable to assume that Radpay would

have worked the same proportion of mechanic's hours in the second and third quarter of 1993 as he had worked in 1992.

Dispatcher/operations coordinator John Mozol was unlawfully terminated on June 12 or 13, 1993, when Respondent refused to allow him to return from disability. Mozol apparently remained on disability and backpay is not claimed to commence until the second quarter of 1995, when Mozol was able to return to work. While Mozol was on disability, he was not replaced. Rather, other employees and managers performed his duties. Backpay for Mozol was tolled in January 1998, when the tours and ticket sellers were eliminated.

Respondent contends that it had no need for Mozol after July 23, 1993. Gridley testified that when the shuttle closed in July 1993, and again in 1994 when the tour business was reduced, there no longer was any need for Mozol's position and he was not replaced. Gridley also testified that there was no other job in the company that Mozol could have filled.

The Board found that Mozol served as a conduit for the transmission of the driver assignments made by the supervisors, and regularly accessed the schedule on the computer. In the underlying case, Mozol testified that his duties included inputting the drivers' and tickets sellers' tour schedules that Hoa Van filled out, and the changes that were sent over from the office, and then printing them out. Mozol's other duties included keeping handwritten and computer records of scheduling, vehicle maintenance, safety reports, sales and lease records, customer service issues, maintenance of Department of Transportation and OSHA files, and answering the phones.

Gridley testified that even when Hoa and Ty Van were in the office, some of Mozol's other daily job duties were

to check the faxes from the office, check to see what cable cars had broken down, make reports on needed mechanical work, make sure that needed parts were purchased, and sometimes pick up the parts himself. Gridley also testified that Mozol's job duties included filling in for Hoa and Ty Van when they were out of the barn, either during part of the day or when they were away on their days off or vacation. Mozol's duties on these occasions were to make sure that the tours, shuttles, and promotions ran on time. His duties also included putting the paperwork together, coordinating with the drivers, making sure late drivers were going to show up, and helping to find additional drivers for absent drivers or when a cable car broke down and needed to be replaced.

The General Counsel showed that the shuttle was resumed on more than an experimental basis from 1994 through 1997. The tour business continued even after the lease at Pier 41 was lost. In addition, as discussed above, prior to January of 1998, Respondent continued to hire new drivers and ticket sellers. The coordination of these employees' schedules, and Mozol's other job duties needed to be done. Gridley admitted that Mozol's work, albeit on a reduced scale, still existed. This work was done by the Vans, the office staff, drivers, and the mechanics. Respondent did not establish how much of Mozol's job was reduced because of the reduction in business.

I view this as a burden of proof issue. Work previously done by Mozol, a discriminatee was assigned to other employees and managers. The Act does not require Respondent to hire or employ more employees than necessary. However, having unlawfully terminated Mozol, the burden was on Respondent to show when Mozol would have been lawfully laid off. I find Respondent has not met this burden. Thus, I find Mozol would have continued in

Respondent's employ until January 1998, when Respondent discontinued its tours and discharged its ticket sellers.

On the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hreby issue the following recommended

SUPPLEMENTAL ORDER[9]

IT IS HEREBY ORDERED that Respondent, Cable Car Advertisers, Inc., d/b/a Cable Car Charters, forthwith pay to each of the following persons backpay in the amounts set opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of January 22, 1992:

9 All outstanding motions inconsistent with this order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusion, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all proposes.

Diana Miles	$ 15,459.86
Kent Bishop	$ 3,422.26
Robert Telles	$ 5,092.31
William Trulock	$ 26,118.71
Luis Recinos, Jr.	$ 2,363.26
Douglas Horning	$ 3,869.07
Carl Hovdey	$ 397.75
Jon Palewicz	$ 12,717.47
Sheila Lambert	$ 2,055.00
Michele Zimmerman	$ 2,672.62
Fred McKenzie	$ 5,905.73
Kohlee Gleffe	$ 3,167.90
Michael Buckey	$ 8,113.00
Randy Morrison	$ 2,617.44
John Modica	$ 1,903.65
Andrea Terhune	$ 317.36
Susan Chan	$ 249.15
Porfirio Coyoy	$ 14,464.40
Rudy Galindo Ortiz[10]	$ 1,970.63
Victoria Mazariegos	$ 1,455.00
Mavillia Lillienthal	$ 1,663.75
Mauricio Velasco	$ 1,779.04
Gholamreza Radpay	$ 7,985.25
John Mozol	$ 15,718.45
TOTAL NET BACKPAY	$141,479.06

10 Backpay for Rudy Galindo Ortiz should be paid to the Regional Director to be held in escrow for a period not to exceed 1 year from either Respondent's compliance or to the date the Board's Supplemental Decision and Order becomes final, including enforcement, whichever is later. See *Starlite Cutting, Inc.*, 284 NLRB 620 (1987). If Ortiz is not located within that time period, his backpay shall be returned to Respondent. If Ortiz is located within that time period, interim earnings and other deductions to gross backpay can be resolved informally or through a supplemental compliance proceeding, if necessary, and the excess, if any, returned to Respondent

1993-1994

AGREEMENT

By And Between

CABLE CAR CHARTERS, INC.

AND

PROFESSIONAL AND CLERICAL
EMPLOYEES DIVISION OF
FREIGHT CHECKERS, CLERICAL
EMPLOYEES & HELPERS
LOCAL NO. 856, I.B.T.

THIS AGREEMENT, made and entered into this 9th day of December, 1993, by and between CABLE CAR CHARTERS, Inc. hereinafter referred to as the "Employer" and the PROFESSIONAL AND CLERICAL EMPLOYEES DIVISION OF FREIGHT CHECKERS, CLERICAL EMPLOYEES & HELPERS, LOCAL NO. 856, International Brotherhood of Teamsters hereinafter referred to as the "Union", covering work in the covered classifications in San Francisco, California.

WITNESSETH

In consideration of the premises and of the respective promises, agreements and covenants of said parties, they do hereby agree as follows, to wit:

SECTION 1 RECOGNITION OF THE UNION

1.1 The Employer recognizes the Union as the sole collective bargaining agent for all employees covered by this Agreement.

SECTION 2 EXEMPT EMPLOYEES

2.1 Excluded from this Agreement are managers, supervisors, salespersons, confidential employees and temporary employees. Temporary employees are those employed for short term assignments. Such employees will be hired for short term work only where regular or on-call employees are unavailable or unable to perform the work and the Employer has made reasonable efforts to notify the Union in advance that the regular and on-call employee pool has been exhausted. Temporary employees shall not be hired for the purpose of diminishing bargaining unit positions. All drivers, ticket sellers, dispatchers, mechanics, maintenance personnel, and all others primarily working at, or out of, the car barn of the

Employer, are specifically covered by this Agreement as specified in N.L.R.B. Case No. 20-RC-16906.

SECTION 3 UNION SECURITY

3.1 Only members in good standing in the Union shall be retained in employment. For the purposes of this Agreement, "members in good standing" shall be defined to mean employees who tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. All employees shall become members of the Union in good standing from the effective date of this Agreement or after thirty (30) calendar days from their date of employment, whichever is later, and shall remain members of the Union in good standing as a condition of continued employment.

3.2 When the Employer is notified by the Union in writing that an employee has failed to tender the Union's standard initiation fee or reinstatement fee or is not a member in good standing by failing to tender such, the Employer shall within five (5) calendar days terminate such employee.

3.3 The Union shall indemnify the Employer and its officers and agents, and hold it and them harmless from any and all claims, demands, charges, actions, suits or other assertions of liability against the Employer and/or its officers and/or agents by or for any employee discharged by the Employer at the request of the Union.

SECTION 4 HIRING

4.1 The Employer shall give the Union an opportunity with other sources to refer suitable applicants for employment, but the Employer shall not be required to hire those referred by the Union or any other particular source.

4.2 The following information will be given in writing, by the Employer to the Union after a new employee has worked more than fourteen (14) days from the date of hire: (1) name, home address, telephone number, and social security number of employee; (2) date employed; (3) hourly rate of pay and (d) job classification.

4.3 The Employer shall be the sole judge of the competency of new applicants and probationary employees.

4.4 New employees shall be on probation during the first forty-five (45) calendar days or sixty (60) hours of their employment, whichever is longer, and may be subject to discharge during this period without recourse. However, the Employer agrees that no applicant or new employee will be discriminated against or discharged because of membership in, or support of, the Union.

SECTION 5 SENIORITY

5.1 Seniority shall apply to all employees covered by this Agreement.

5.2 *Company Seniority* is defined as the most recent continuous and unbroken period of service with the Employer in a bargaining unit position. Company seniority shall be used only for the purpose of breaking ties in category and/or classification seniority.

5.3 A) *Classification Seniority* is defined as the most recent continuous and unbroken period of service with the Employer in a classification. An employee shall accrue classification seniority in only one classification or subclassification at a time.

i) The job classifications provided by this Agreement are:

a) Drivers

b) Mechanics

c) Maintenance personnel

d) Ticket sellers/dispatchers

5.3 B) Category Seniority is defined as the most recent continuous unbroken period of service with the Employer in a category of employment. For purposes of this Agreement, an employee may accrue seniority in the following categories:

i) Full Time Regular Employee (FTR). An FTR is defined as someone who regularly works thirty-five (35) hours or more per week.

ii) Part Time Regular Employee (PTR). A PTR is defined as someone who regularly works less than thirty-five hours per week.

iii) On Call/Will Call Employees. An On Call/Will Call employee is defined as someone who works for the Employer on an on-call/will-call basis without any regularly scheduled shifts each week.

While the Employer may from time to time call the various OC/WC employees with offers of available work, it is the responsibility of the OC/WC employees themselves to call into the Employer to book work if it is available. It is also the responsibility of the OC/WC employees to make sure that they each work a minimum of once per six (6) months in order to retain their seniority rights as provided by this Agreement.

5.4 Employees shall not acquire seniority until they have successfully completed their applicable probationary period as provided in Section 4 of this agreement. An employee shall cease to have seniority rights if:

A) He quits voluntarily.

B) He is discharged for just cause.

C) He is absent three (3) scheduled work shifts without notice to the Employer in any four (4) month period.

D) He works no hours during a six (6) month period of time, when work was available.,

E) He retires from employment.

F) He refuses three (3) scheduled work shifts within any six (6) month period.

5.5 Classification seniority in a category shall govern in placing employees in higher paid jobs or better jobs with equal pay within the same category and classification provided employees are capable of performing the job, as determined by the Company. In the event of a dispute over such a transfer to a higher paid or better job, the Union may file a grievance alleging that the Employer has made its determination arbitrarily, capriciously or discriminatorily.

An employee who is placed in such a higher paid or better job, but who feels he or she is not qualified for the new position or who is unable to perform the duties of the new position, has the option of returning to his or her previous job with full seniority within fourteen (14) days of commencing the new position. Within fourteen (14) days, the employee who accepts an offer of a higher paid or better job and is unable to perform the duties of such job, in the sole discretion of the Employer, shall be returned to his or her previous job with full seniority, provided that the return does not unduly inconvenience the replacement.

5.6 The Employer shall make its best efforts to distribute private charters, also known as "promotions," fairly and equitably. An employee may reject an assigned promotion at his/her option, subject to sections 5.4 and 5.8 of this Agreement.

5.7 Subject to the grievance procedure, the Company expressly reserves the right to assign drivers in a manner

other than provided in this Section 5 in the event that a particular driver is unqualified for a particular job, or a promotion (charter) customer requests a specific driver.

5.8 Drivers turning back in promotions must do so no later than seven days before the event unless such turnback is due to an emergency subject to proof, or unless such turnback is accepted by the Employer. In the event a driver is given less than seven days notice of a promotion, he must turn back that promotion no later than twenty-four (24) hours prior to the event.

5.9 Notices for job openings covered by this Agreement and managerial positions shall be posted in a conspicuous place or places where employees shall see them for five (5) calendar days.

5.10 The Employer shall maintain up-to-date seniority rosters by classification for each category (the full name, hours worked, social security number, job titles) and a copy shall be furnished to the Union upon request.

5.11 All shifts, excluding private charters ("promotions") shall be posted for bid at least seven (7) days in advance. Employees within each category may bid on shifts for work which they are qualified to perform according to category seniority within their classification.

First to bid shall be full-time regular employees ("FTRs"). FTRs shall be permitted to bid up to forty (40) hours per week. Part-time regular employees ("PTRs") shall bid next. PTRs may bid for up to thirty-four (34) hours per week. Any remaining work shall be made available by the Employer, notwithstanding seniority and in a manner not inconsistent with the other terms and conditions of this Agreement.

SECTION 6 DISCRIMINATION

6.1 There shall be no discrimination by the Employer against any employee on account of Union membership

or for upholding Union principles. There shall be no discrimination because of race, color, creed, sex, age, religion, national origin, sexual orientation and/or psychological and physical disabilities as required by Local, State and/or Federal law, with disputes subject to the grievance procedure contained herein. Administration of this Section shall conform to applicable State and/or Federal Laws.

SECTION 7 DISCHARGE OR SUSPENSION

7.1 The Employer may discharge, suspend or otherwise discipline an employee for just cause. Just cause includes, but is not limited to, insubordination; chronic tardiness; excessive absenteeism; theft; dishonesty; possession, sale or use of illegal or illegally obtained drugs or alcohol on the premises; being under the influence of drugs or alcohol; incompetence; grossly unbecoming conduct; violation of any Company work rule; destruction of property; misrepresentation or failure to disclose any material fact in an employment application, interview(s) or Employer record(s); unauthorized use of Company property, such as duplicating machines, telephones, etc. or any similar such misconduct. The Company will normally utilize a process of progressive discipline for employee misconduct by providing an oral warning, a written warning, a suspension and/or discharge. It is the intent of this provision for the disciplinary action to fit the severity of the employee's misconduct, however, the Employer shall determine the appropriate level of discipline provided this is not done in an arbitrary or capricious manner. The Employer may suspend an employee for one (1) day without pay for refusing to sign a written disciplinary warning, provided however the signature reflects only an acknowledgement of receipt of the disciplinary warning and that the actual warning notice reflect the same. The

Company will also show the affected employee a copy of this section of the Agreement at the time of issuance of said warning.

7.2 No warning notice shall remain in effect for a period of more than twelve (12) months. No warning notice or other disciplinary action of any kind may be cited or used in any manner after the 12-month period has expired. A copy of any warning notice or other disciplinary action shall be given to the employee and sent to the Union at the time it is issued to the employee. A warning notice must be issued within ten (10) working days of the alleged cause for the warning or within ten (10) working days of the Employer's knowledge of the cause for such warning notice.

7.3 An employee may request an investigation of his discharge or suspension or any warning notice and the Union shall have the right to protest any such discharge, suspension or warning notice. Any such protest shall be presented to the Employer in writing within ten (10) days, exclusive of Saturdays, Sundays, and holidays, after the discharge, suspension or warning notice and if not presented within such period, the right to protest shall be waived. Upon the filing of a protest the matter shall be immediately referred to an adjustment board selected in the manner provided in Section 8 for the determination in accordance with the disputes procedure set forth herein.

7.4 The Employer shall give a discharged employee a written notice of termination, and at the same time send a copy to the Local Union.

SECTION 8 ADJUSTMENT OF GRIEVANCES

8.1 Disputes arising between the employee or the union and the Employer regarding the interpretation and/or application of the specific terms of this agreement,

and/or disciplinary action, including discharge taken pursuant to alleged violations(s) of work rules or procedures and/or the terms and conditions of this collective bargaining agreement shall be processed in the time and manner as follows:

8.2 Following the filing of the grievance as set forth above, the employee shall have the responsibility of attempting to resolve the matter with his/her immediate supervisor or other authorized Employer Representative within ten (10) days of the filing of the grievance.

8.3 If the grievance is not satisfactorily settled as provided above, the Union shall next take the matter up with a designated Employer Representative. Such grievance must be taken up with the Employer Representative within twenty (20) days from the date of the filing of the grievance.

8.4 If the grievance is not resolved as set forth above, the Union may file a written grievance with the Employer, and the dispute shall be referred to an Adjustment Board. The written grievance shall set forth the facts giving rise to the dispute including the date and persons involved and designate the specific grievance as well as the specific remedy sought.

8.5 The Adjustment Board shall consist of two (2) representatives of management and two (2) representatives of the Union.

8.6 The Adjustment Board shall be empowered to hear and resolve by simply majority all grievances properly brought before them. The adjustment board shall hear such grievances no sooner than ten (10) days but no later than thirty (30) days from the date on which the matter is deemed unresolvable at the previous step. The adjustment board shall have no power to alter or amend the terms of this Agreement. All time limits set forth

herein can be waived by mutual agreement of the Union and the Employer. No briefs, transcripts, or stenographic record shall be taken of the adjustment board meeting. No lawyer shall appear as an advocate on behalf of either party. The Adjustment Board shall not be bound by formal rules of evidence. Nothing shall preclude the adjustment board from hearing more than one grievance at any one session, provided that the nongrieving party has been fully informed in writing, in advance of all grievances to be heard.

8.7 If the adjustment board fails to settle or decide the dispute, the matter may be referred to an impartial arbitrator by either the Employer or the Union and the decision of the impartial arbitrator shall be binding on all parties. Notice by either party to the other of their desire to place the matter before an impartial arbitrator shall be submitted to the other party in writing within five (5) days of notification by the adjustment board of their inability to decide the matter. In the event neither party notifies the other of the desire for arbitration within the five (5) days specified herein, then in that case the matter shall have been deemed to have been settled in favor of the party against whom the grievance, dispute or controversy had been brought. If the parties are unable to agree upon the selection of an arbitrator, either party may request the Federal Mediation and Conciliation Service to submit a list of five (5) arbitrators from which the parties may jointly make such selection. If the parties fail to agree on the selection of an arbitrator from this list, each party shall alternately strike one (1) name each from the list until but one (1) name remains who shall be the arbitrator. A flip. of a coin shall decide which of the parties shall strike the first name from the list. The arbitrator shall not have the power to add to, ignore or modify any of the terms, conditions, or sections of this Agreement. His or

her decision shall not go beyond what is necessary for the interpretation and application of this Agreement in the case of the specific grievance at issue. The cost of such arbitration shall be borne by the party against whom the arbitration is rendered or as otherwise decided by the arbitrator.

8.8 The parties may, by mutual agreement request expedited arbitration. In an expedited arbitration proceeding, both parties shall waive their rights as to submission of any briefs and stenographic recordings. The arbitration proceedings must be continuous to a conclusion. The arbitrator must render a bench decision immediately following the close of the hearing, followed by a written decision within seven (7) days of the close of the hearing.

SECTION 9 VISITS TO ESTABLISHMENTS

9.1 It is mutually agreed that duly authorized representatives of the Union shall be permitted to visit the facility of the Employer to ascertain whether the terms of this Agreement are being observed or to assist in adjusting any grievances which may arise. Visits by Union representatives shall be carried out with dispatch. A reasonable attempt shall be made to contact an employee either when the employee is off the clock or on break. Union representatives shall not contact any employee while he/she is on- duty and working with customers. The Union may also designate two (2) shop stewards to inform and represent employees covered by this Agreement. Said shop stewards duties shall not interfere with employees working time.

IN WITNESS WHEREOF the parties hereto have executed this Collective Bargaining Agreement on the dates indicated below.

PROFESSIONAL & CLERICAL
EMPLOYEES DIVISION OF FREIGHT
CHECKERS, CLERICAL EMPLOYEES &
HELPERS, UNION, LOCAL NO. 856, I.B.T.

By: /s/ Bev Leal

Date: 12-16-93

CABLE CAR CHARTERS, INC.

By: /s/ Arnold S. Gridley
Arnold S. Gridley, President

Date: Dec. 15, 1993

[Pages 8 through 14 of the Agreement are omitted.]

Supreme Court, U.S.
FILED
MAY 2 8 2003
OFFICE OF THE CLERK

(2)

No. 02-1409

In the Supreme Court of the United States

CABLE CAR ADVERTISERS, INC., D/B/A
CABLE CAR CHARTERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether substantial evidence supported the National Labor Relations Board's determination that the back pay period for reduced-hour claimants closed on May 29, 1999.

2. Whether substantial evidence supported the Board's back pay awards for Jonathan Palewicz and John Mozol.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the *Federal Reporter* but is reprinted in 53 Fed. Appx. 467. The supplemental decision and order of the National Labor Relations Board (Pet. App. A5-A7) and the supplemental decision of the administrative law judge in the compliance proceeding (Pet. App. A7-A38) are reported at 336 N.L.R.B. No. 85. The Board's decision and order in the underlying unfair labor practice case are reported at 322 N.L.R.B. 554.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2002. A petition for rehearing was denied on February 21, 2003. Pet. App. A3-A4. The petition for a writ of certiorari was filed on March 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates sightseeing tours and similar transportation services in San Francisco, California. Pet. App. A8. Petitioner employs drivers, dispatchers, ticket sellers, maintenance workers, and mechanics. *Id.* at A9. In the spring of 1993, petitioner's employees began to organize with the Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO (Union). *Id.* at A1, A9. In June 1993, after conducting an election among petitioner's employees, the National Labor Relations Board certified the Union as the employees' exclusive bargaining representative. *Id.* at A9.

In November 1996, the Board issued a decision finding, in agreement with an administrative law judge (ALJ), that, on June 15, 1993, petitioner began a practice of reducing the work hours of a group of employees who supported the Union, contrary to Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3).[1] Pet. App. A9. The Board ordered petitioner to make those employees economically whole for the

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[1] Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to "by discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

unlawful reduction in their work hours and to cease and desist from unlawfully reducing employee work hours. *Id.* at A9-A10. See *In re Cable Car Advertisers, Inc.*, 322 N.L.R.B. 554 (1996), decision supplemented, 324 N.L.R.B. 732 (1997).

The Board further found that, in June and July 1993, petitioner also violated Section 8(a)(3) by laying off or discharging a group of employees who supported the Union, including Jonathan Palewicz (a driver) and John Mozol (a dispatcher). Pet. App. A7, A9. The Board ordered petitioner to reinstate and make whole Palewicz and Mozol (and other employees). *Id.* at A9. In February 1998, the court of appeals enforced the Board's order. *Id.* at A7-A8. See *Cable Car Advertisers* v. *NLRB*, 139 F.3d 903 (9th Cir. 1998) (Table).

2. Subsequently, petitioner and the Board were unable to agree on the amount of back pay due employees under the Board's order. Pet. App. A8. The Board's General Counsel therefore issued a compliance specification against petitioner. *Ibid.*

a. One of the issues in the compliance proceeding was the determination of an appropriate closing date of the back pay period for the employees whose work hours had been unlawfully reduced. See Pet. App. A10, A21-A23. On December 9, 1993, petitioner and the Union had entered into a labor contract that contained seniority provisions and job bidding procedures. *Id.* at A10, A14, A22, A40, A42-A45. Petitioner contended that December 9, 1993, was the appropriate closing date for the back pay period. Petitioner claimed that it did not unlawfully discriminate against employees in the assignment of work after signing the labor contract but instead assigned work in accordance with the contract's terms. *Id.* at A22.

The General Counsel, however, contended that the execution of the labor contract did not terminate the back pay period because petitioner discriminated against employees in the assignment of work even after petitioner signed the contract. Pet. App. A22. The General Counsel contended that the back pay period did not close until May 29, 1999, the date on which petitioner gave employees formal assurances that it would schedule their work in accordance with the labor contract. *Id.* at A10, A22.

After a hearing, an ALJ sustained the General Counsel's position and concluded that "the backpay period for the unlawful reduction in hours continued until May 1999." Pet. App. A23. "[V]iew[ing] this as a burden of proof issue," the ALJ placed upon petitioner "the burden of establishing that the discrimination ceased" as of the December 1993 date. The ALJ concluded that petitioner had failed to carry that burden. *Id.* at A22-A23.

The ALJ credited the testimony of the General Counsel's witnesses that Hoa Van, petitioner's supervisor, "continued to discriminate against them in the assignment of hours" after December 1993. Pet. App. A23. In particular, the ALJ credited discriminatee Palewicz's testimony that Van refused to answer Palewicz's telephone calls when he attempted to bid for work and closed her office door when he appeared in person to bid for work. *Ibid.* The ALJ also credited discriminatee Michael Buckey's testimony that, rather than permit Buckey to bid on available assignments, Van offered work to less senior employees and continually bypassed Buckey for assignments in 1994 and 1995. *Ibid.* The ALJ also relied on petitioner's business records, which demonstrated that "employees junior to the discriminatees continued to work more hours

than the discriminatees" after petitioner signed the labor contract. *Ibid.*; see *id.* at A14-A17. In contrast, the ALJ found that "[a]ll [petitioner] offered" in support of its proposed December 9, 1993, closing date for the back pay period were "general denials that [it] never discriminated in its assignment of work to any of its employees." *Id.* at A23. Based on the persuasive evidence to the contrary in the record, the ALJ found those general denials to be "unpersuasive." *Ibid.*

b. Also at issue in the compliance proceeding was the amount of back pay that petitioner owed Palewicz and Mozol. Pet. App. A32-A33, A35-A37. The ALJ rejected, as contrary to the evidence, petitioner's contention that Palewicz's award should be calculated based on the assumption that he would have worked for petitioner only two days per week (Wednesdays and Thursdays) if he had not been unlawfully discharged. See *id.* at A32-A33. The ALJ also rejected petitioner's contention that, if Mozol had not been unlawfully discharged, his employment would have ended on July 23, 1993, for legitimate reasons. Rather, the ALJ found that Mozol "would have continued in [petitioner's] employ until January 1998." *Id.* at A36-A37.

3. The Board adopted the ALJ's findings and conclusions. Pet. App. A5. It ordered petitioner to pay specified amounts of back pay to the reduced-hour claimants, as well as to Palewicz and Mozol. *Id.* at A6-A7.

4. The court of appeals enforced the Board's order in an unpublished memorandum opinion. Pet. App. A1-A2. The court concluded that "[s]ubstantial evidence supports the National Labor Relations Board's determination of the end dates of the backpay periods." *Id.* at A2. The court further concluded that petitioner "did

not carry its burden of proving that the award to any of the plaintiffs should have been reduced." *Ibid.*

ARGUMENT

The court of appeals correctly enforced the Board's back pay order in this case. The court's unpublished decision does not conflict with any decision of this Court or any other court of appeals. Thus, this Court's review is not warranted.

1. a. In a Board compliance proceeding, "[t]he General Counsel bears the burden of proof in establishing the backpay period." *Nordstrom* v. *NLRB*, 984 F.2d 479, 481 (D.C. Cir. 1993). If the General Counsel carries that burden, then the employer bears the burden of proving, as an affirmative defense, a claim that the back pay award should be reduced because the back pay period closed on an earlier date. See, *e.g.*, *Mastell Trailer Corp.*, 273 N.L.R.B. 1190, 1190-1191 (1984), enforced, 782 F.2d 1047 (8th Cir. 1985) (Table). Those rules reflect the general principle that "the burden is upon the General Counsel to show the gross amounts of back pay due" and, once the General Counsel does so, then "the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

As the court of appeals concluded (Pet. App. A2), substantial evidence supports the General Counsel's position that the back pay period for the reduced-hour claimants closed on May 29, 1999. Witnesses credited by the ALJ testified that petitioner continued to assign work on a discriminatory basis even after petitioner and the Union executed the labor contract on December 9, 1993. *Id.* at A23, A40. Petitioner's business records

confirmed that "employees junior to the discriminatees continued to work more hours than the discriminatees" after petitioner signed the labor contract. *Id.* at A23; see *id.* at A14-A17. Petitioner did not formally assure employees that it would assign work in accordance with the labor contract until May 29, 1999. *Id.* at A10, A22. The evidence thus amply supports the conclusion that, until that date, petitioner did not manifest a commitment to abide by the Board's order that it cease and desist from assigning work on a discriminatory basis. The General Counsel thus satisfied his burden of establishing that the back pay period closed on May 29, 1999. See *88 Transit Lines, Inc.*, 314 N.L.R.B. 324 (1994) (back pay period closed on date when employer reinstituted a work schedule that it had unlawfully changed), enforced, 55 F.3d 823 (3d Cir. 1995); *H.C. Macaulay Foundry Co.* v. *NLRB*, 553 F.2d 1198, 1202 (9th Cir. 1977) (union terminated its back pay liability as of date on which it requested employer to reinstate the discriminatee).

The court of appeals also correctly concluded that petitioner "did not carry its burden of proving" that the back pay award "should have been reduced." Pet. App. A2. As the ALJ found, petitioner offered nothing in support of its argument in favor of an earlier closing date other than "general denials" that it "never discriminated in its assignment of work to any of its employees." *Id.* at A23. In view of the contrary evidence adduced by the General Counsel, the ALJ reasonably found that those general denials were "unpersuasive." *Ibid.* The court of appeals' fact-bound conclusion that substantial evidence supports the Board's determination that May 29, 1999, was the proper closing date of the back pay period for the reduced-hour claimants raises no issue warranting this

Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. Petitioner contends (Pet. 14-17) that this Court's review is warranted because the ALJ applied an erroneous presumption that NLRA "violations once proved continue to occur." Pet. 15. The court of appeals, however, did not advert to or in any way endorse such a presumption. Instead, the court correctly held that substantial evidence supports the Board's determination of the proper closing date for the back pay period. Pet. App. A2. This case thus does not present an opportunity for this Court to consider the validity of a presumption on which the court of appeals did not rely.[2]

c. There is also no merit to petitioner's contention (Pet. 14-15) that the decision of the court of appeals conflicts with *NLRB* v. *International Union of Operating Engineers, Local 925*, 460 F.2d 589 (5th Cir. 1972). In the portion of *Operating Engineers* on which petitioner relies, the court of appeals enforced the Board's award of additional back pay against a union based on new unfair labor practices that the General Counsel proved in a compliance proceeding rather than in an unfair labor practice proceeding. See *id.* at 599-602. There is no conflict between that holding and the de-

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[2] The ALJ correctly noted that "the General Counsel bears the burden of proving the amount of gross backpay due" (Pet. App. A18) and that "the burden is on the employer * * * to establish facts that reduce the amount due for gross backpay" (*id.* at A19). Although the ALJ also adverted to a "presumption" that petitioner continued to discriminate in the assignment of work "after December of 1993" (*id.* at A23), reliance on that presumption was unnecessary to his decision because the General Counsel made an affirmative showing that petitioner discriminated against employees in the assignment of work after that date. See *ibid.*; pp. 4-5, 6-7, *supra*.

cision here. Both courts enforced the Board's back pay order. Moreover, unlike *Operating Engineers*, this case does not involve the imposition of back pay "based upon conduct and events that were not determined to be unfair labor practices" in the underlying unfair labor practice proceeding. *Id.* at 599. Here, there is no question that the Board ruled in the unfair labor practice proceeding that petitioner's reduction of the work hours of employees who supported the Union violated NLRA Section 8(a)(3). See Pet. App. A9; *In re Cable Car Advertisers, Inc.*, 322 N.L.R.B. at 554, 580. In the subsequent compliance proceeding, the Board did not adjudicate any further violations but simply rejected an established violator's proposed closing date for the back pay period based on evidence that undermined the propriety of that closing date. *Operating Engineers* did not address any such issue.

2. Petitioner also incorrectly contends (Pet. 17-18) that, in awarding Palewicz back pay, the ALJ improperly "change[d]" the Board's finding, in the underlying unfair labor practice proceeding, that Palewicz "could not drive for [petitioner] on Fridays, Saturdays, and Sundays." That fact-bound contention, which (like petitioner's primary contention) involves an attack on the ALJ decision rather than the decision of the court of appeals, lacks merit and does not warrant this Court's review.

The Board did not determine in the underlying unfair labor practice proceeding that Palewicz was never able to drive on Fridays, Saturdays, or Sundays. Rather, the Board found that petitioner's requiring Palewicz to work on those days "conflicted with his work elsewhere." *In re Cable Car Advertisers, Inc.*, 322 N.L.R.B. at 573. Consistent with that earlier finding, the ALJ found in the compliance proceeding that

Palewicz could not "commit * * * in advance" to drive on those days because of his other job. Pet. App. A32. Nonetheless, Palewicz drove "promotional" jobs for petitioner "on days that he also worked his regular job." *Ibid.* For example, "[i]n 1992, Palewicz often worked 5 or 6 days a week for [petitioner] in addition to his full time job" and sometimes worked as much as "40 to 60 hours a week for [petitioner] in addition to his [other] job." *Id.* at A33. The ALJ therefore properly awarded Palewicz back pay on the basis that he worked for petitioner more than two days per week.

3. Finally, petitioner contends that, with respect to Mozol's back pay award, the General Counsel should have brought to the ALJ's attention a March 1999 memorandum, consisting of the Board compliance officer's notes, which indicated that Mozol "voluntarily moved to Wisconsin at the beginning of 1994 and would not have returned to work in San Francisco after mid-1995." Pet. 18. Petitioner argues (*ibid.*) that this information could have led the ALJ to reduce Mozol's back pay award by $10,000. Petitioner is jurisdictionally barred from raising that claim in this Court because petitioner failed to urge such an objection before the Board, and it has alleged no "extraordinary circumstances" excusing its failure to do so. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, petitioner's contention lacks merit. Petitioner concedes that the Board's compliance officer gave a copy of the March 1999 memorandum to "[petitioner's] counsel in the early stages of the backpay proceeding, and that counsel delivered the memo to [petitioner] when that counsel withdrew from repre-

sentation of [petitioner] due to a fee dispute." Pet. 14. The Board cannot be faulted for petitioner's failure to place into evidence a document that petitioner had in its possession. Petitioner bore the burden to establish facts mitigating its back pay liability to Mozol. See *Brown & Root*, 311 F.2d at 454.

Contrary to petitioner's suggestion (Pet. 19), the General Counsel was not required to "share[]" the March 1999 memo with the ALJ under *Lising* v. *INS*, 124 F.3d 996 (9th Cir. 1997). At most, *Lising* indicates that a court of appeals may remand a case for reconsideration when an agency's decision is "directly disproved" by information that the aggrieved party provided to the agency on an official government form. See *Id.* at 998-999. This case involves no such circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003

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No. 02-1409

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 2002

CABLE CAR ADVERTISERS, INC., DBA
CABLE CAR CHARTERS,
a California Corporation,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
FREIGHT CHECKERS, CLERICAL EMPLOYEES &
HELPERS LOCAL 856,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO,
Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI

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1. Where Cable Car Entered into a Labor Agreement with Local 856 at the End of 1993, No Weight at All Should be Accorded the 1993 Violations in Deciding Allegations of Post-1993 Violations of the Act.

88 Transit Lines, Inc. v. NLRB 55 F.3d 823 (3rd Cir. 1995) and H.C. Macaulay Foundry Co. v. NLRB 553 F.3d 1198 (9th Cir. 1977) both involved what might be termed on-going or continuing violations of the Act. A certain bus route was discontinued. A particular employee was blacklisted. But Cable Car's 1993 violations against the reduced-hours employees were not on-going and not continuing. In the underlying proceedings before Judge Schmidt, Bishop testified that all eight of the promotions he was to drive in late July 1993 were abruptly cancelled, and that overall his assignments dropped off in 1993 (Excerpts, p. 18)("Excerpts, p. 18" is 322 NLRB at p. 571). Gleffe testified that after she joined in leafleting the company, her schedule as a ticket seller was reduced first by one day a week, then by two days a week (Excerpts, p. 17). Horning testified that after the Board election (June 17, 1993 - Excerpts, p. 5), all of the August promotions he was scheduled to drive were, he was told, cancelled (Excerpts, p. 18). Lambert wore her union pin to work on May 6, 1993 and the following day, she testified, her assignment as a shuttle driver was cancelled (Excerpts, pp. 12-13). McKenzie testified that his work as a ticket seller was reduced, he was told that because the Union was in he was out, and that he saw a newly hired replacement doing his work (Excerpts, p. 17). Miles testified that after the election her steady tour schedule ended abruptly and that her July and August 1993 promotion assignments were cancelled (Excerpts, pp. 18-19), although it is true that the Region proposed no damages for Miles for 1993 (Excerpts, p. 44), because in 1993 Miles drove a greater percentage of total driver-hours than she had in the base year

of 1992 (Excerpts, pp. 71-72). Telles testified that after participating in handbilling at Pier 41, his hours were cut drastically (Excerpts, p. 19). Trulock testified that after the Board election, 11 promotions he was scheduled to drive were cancelled (Excerpts, p. 19).

The appendices to the Second Amended Compliance Specification and Notice of Hearing, being the governing compliance specification in the case, show the following (April 1, 2002, Excerpts of Record in the Ninth Circuit, 01-71733, p. 34 and following):

Year	Quarter	Bishop	Gleffe	Horning	Lambert
1994	1		917.49	830.72	
	2		1,611.39	968.13	
	3	992.61			
	4	429.91		104.03	
1995	1				
	2				
	3		420.57	826.46	
	4			501.79	
1996	1				
	2		1,695.93	634.95	
	3		1,336.13		
	4		616.53		
1997	1				
	2		706.37		
	3				
	4				
1998	1				
	2				
	3				
	4				950.00
1999	1				
	2				
	3				
	4				

Year	Quarter	McKenzie	Miles	Telles	Trulock
1994	1				
	2	1,272.93			
	3		1,346.91		1,578.45
	4				1,457.75
1995	1				2,305.78
	2				2,992.87
	3		457.05	5,058.56	377.59
	4		1,997.86		417.83
1996	1				
	2				965.64
	3		581.60		1,971.52
	4		979.79		
1997	1		152.35		
	2				4,268.01
	3		605.94		836.75
	4		2,340.65		151.66
1998	1				43.66
	2		1,783.19		1,881.76
	3		2,084.43		1,841.53
	4				
1999	1		3,213.20		
	2		4,886.98		
	3		2,029.74		
	4		2,809.10		

From this evidence it is clear that the 1993 violations were not the cause of the post-1993 damages. The foregoing post-1993 amounts are recoverable as damages only upon proof of new post-1993 violations of the Act. The General Counsel's evidence consisted of a showing that in the above-referenced quarters the discriminatees in question worked fewer hours than at least one less senior employee. That might be the result of illegal discrimination and it might not. There is nothing in the record to tip the

scales in favor of discrimination. Yet damages were awarded exactly as appears above, except the last few quarters for Miles and Trulock.

The 1993 violations must not be considered for this purpose, NLRB v. International Union of Operating Engineers, Local 925, AFL-CIO et al. 460 F.2d 589, 594-602 (5th Cir. 1972), especially where Cable Car entered into a labor contract with Local 856 at the end of 1993, Paramount Cap. Mfg. Co. v. NLRB, 280 F.2d 109, 112 (8th Cir. 1958).

Palewicz testified about Palewicz, Buckey about Buckey. This testimony, even fully credited, does not tend to prove the post-1993 discriminations here alleged.

The Board's Brief in Opposition ignores the absence of a discrimination-based grievance under the contract in all the post-1993 period (R.T. 268-269). It does not address the fact that none of the foregoing eight claimants testified in this backpay proceeding. It dismisses as incredible the uncontradicted evidence of Cable Car's agents that Cable Car adhered to the contract's rule of seniority in assigning work in the post-1993 period (R.T. 327; 368; 493; 587; 590; 626-628; 946-948).

The ALJ's decision in this case, adopted by the Board and enforced by the Ninth Circuit, is in the books. It squarely conflicts with the correct decision of the Fifth Circuit on the same subject in Operating Engineers, supra, 460 F.2d at 598-602.

2. ALJ Schmidt Found as a Fact that Palewicz was Unable to Work on Fridays, Saturdays, and Sundays in 1993.

ALJ Schmidt found; "About 2 or 3 days after the election, Hoa Van telephoned Palewicz to inform him that his schedule had been changed to Friday, Saturday, and

Sunday, days which Palewicz could not drive." Excerpt, pp. 17-18; 322 NLRB at p. 570. In fixing Palewicz's damages for 1993 ALJ Pollack disregarded this finding (A-32-33). Palewicz's damages should be retried.

3. Mozol's Damages Should be Retired.

According to Agent Karen Thompson's notes, Mozol moved to Wisconsin at the beginning of 1994 (notes attached to Cable Car's Opening Brief in the Ninth Circuit, No. 01-71733, April 1, 2002). Mozol was awarded damages for the period up to January of 1998 (Excerpts 67-86). His move to Wisconsin was never communicated to ALJ Pollack and therefore was not addressed in the decision of this case. Upon a proper hearing the ALJ may have reduced Mozol's damages because of the move.

CONCLUSION

This Court should grant Cable Car's Petition for Certiorari. The decision of the Ninth Circuit should be reversed insofar as that decision enforces the Board's order requiring Cable Car to pay post-1993 backpay to Bishop, Gleffe, Horning, Lambert, McKenzie, Miles, Telles and Trulock and insofar as that decision enforces the awards to Palewicz and Mozol. The awards to Palewicz and Mozol should be retried.

Respectfully,

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June 6, 2003